D-0378 SUPREME COURT OF TEXAS CASES 006
EDGEWOOD INDEPENDENT SCHOOL DISTRICT V. KIRBY 1990-91

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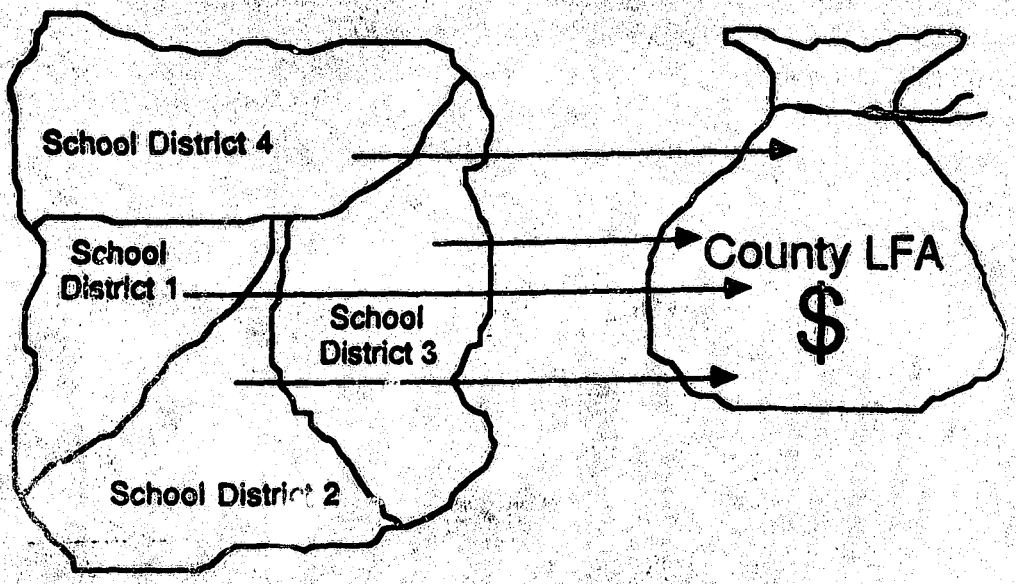
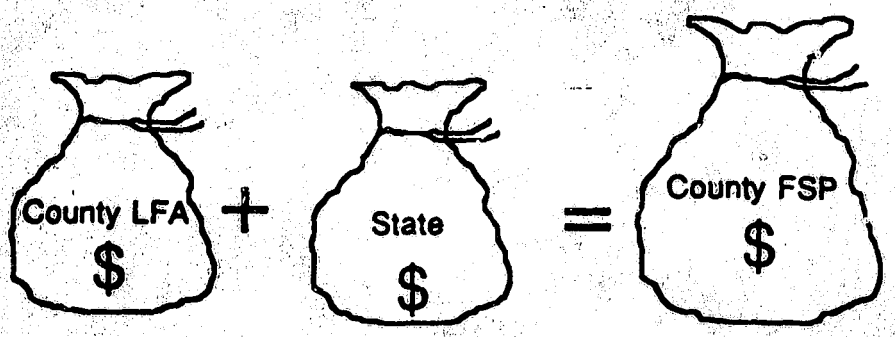


The amount of money raised from the county tax will then be supplemented by State funds. This approach is similar to the present system except that the county, rather than individual school districts, is used as the basis to determine State aid. Under this plan, poor counties will receive more state money than rich counties.



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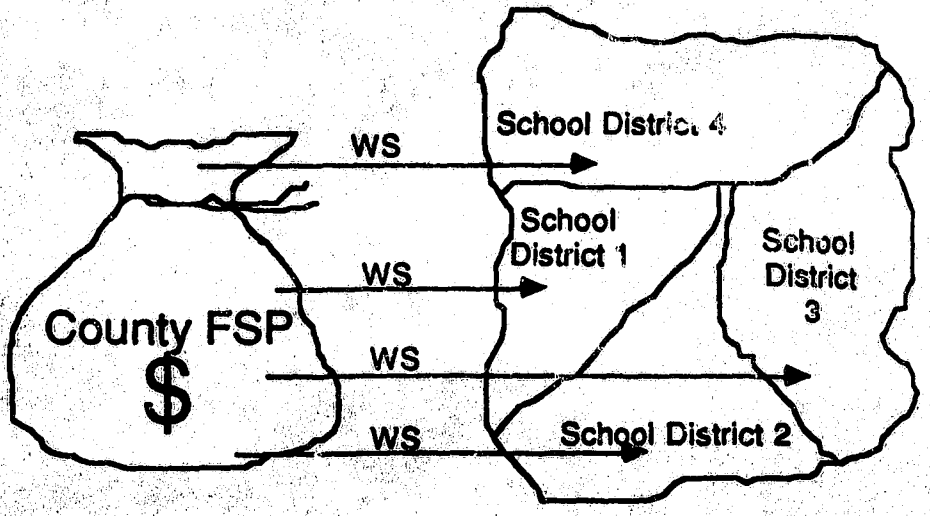

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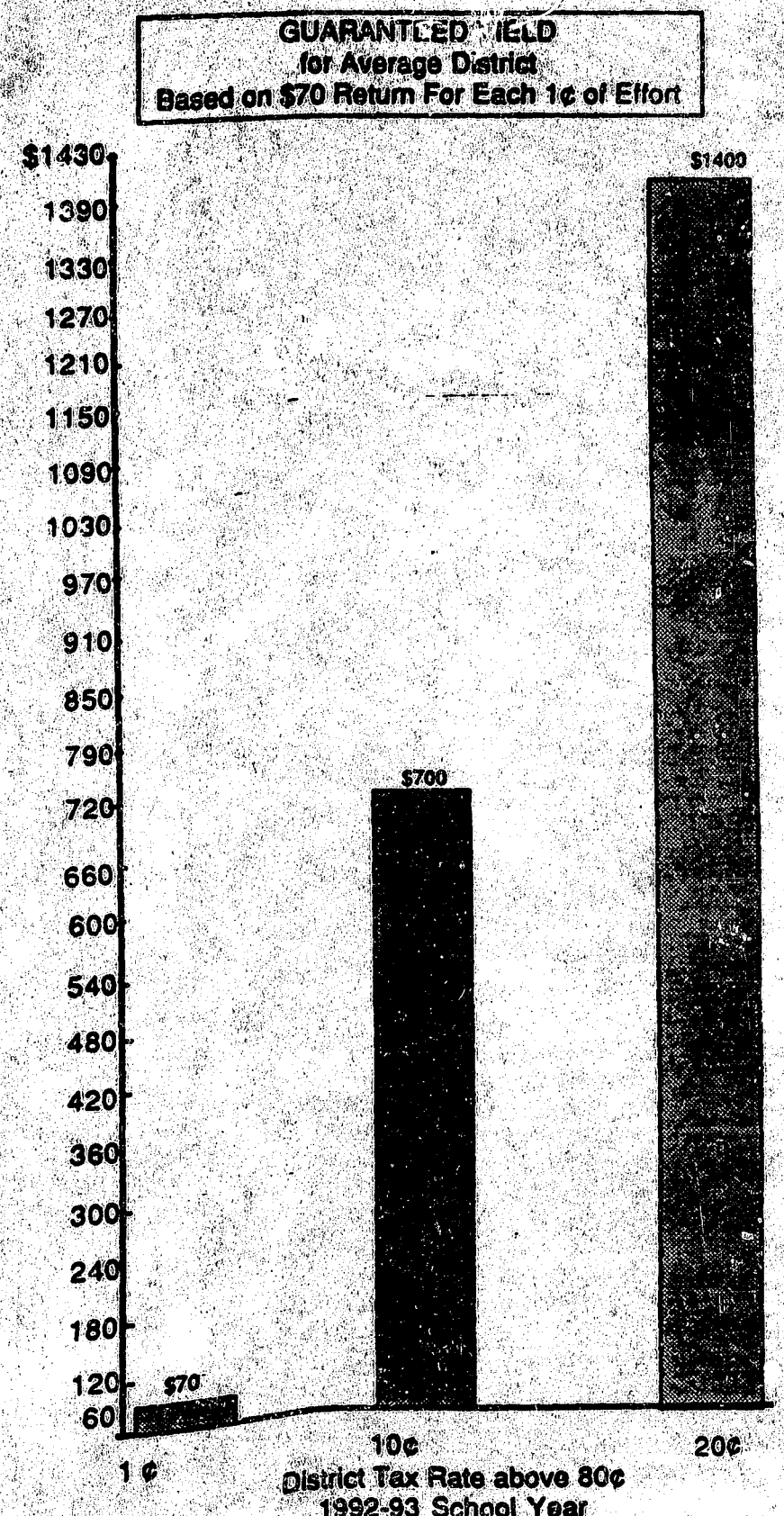
While a county based approach will be used for the Foundation part of the program, districts will be allowed to enrich by raising additional taxes above the 80¢ level. The plan allows local districts to enrich the program above the county level by up to 20¢ of additional local tax effort. Every district is guaranteed the same revenue per pupil for the same tax effort using a guaranteed yield approach similar to the one now being used. The State pays the difference between the guaranteed yield and the amount the district can raise from its tax base.

The plan guarantees that in 1990 districts will have $35 per pupil (on a statewide average for every 1¢ of tax effort over the 80¢ county rate,) up to $700 for a maximum of 20¢. This guarantee is increased to $70 per 1¢ of tax effort by the 1992-93 school year. The State pays the difference between the guaranteed yield and the amount the district can raise from its tax base. Allowing local school districts to enrich their program maintains local control.



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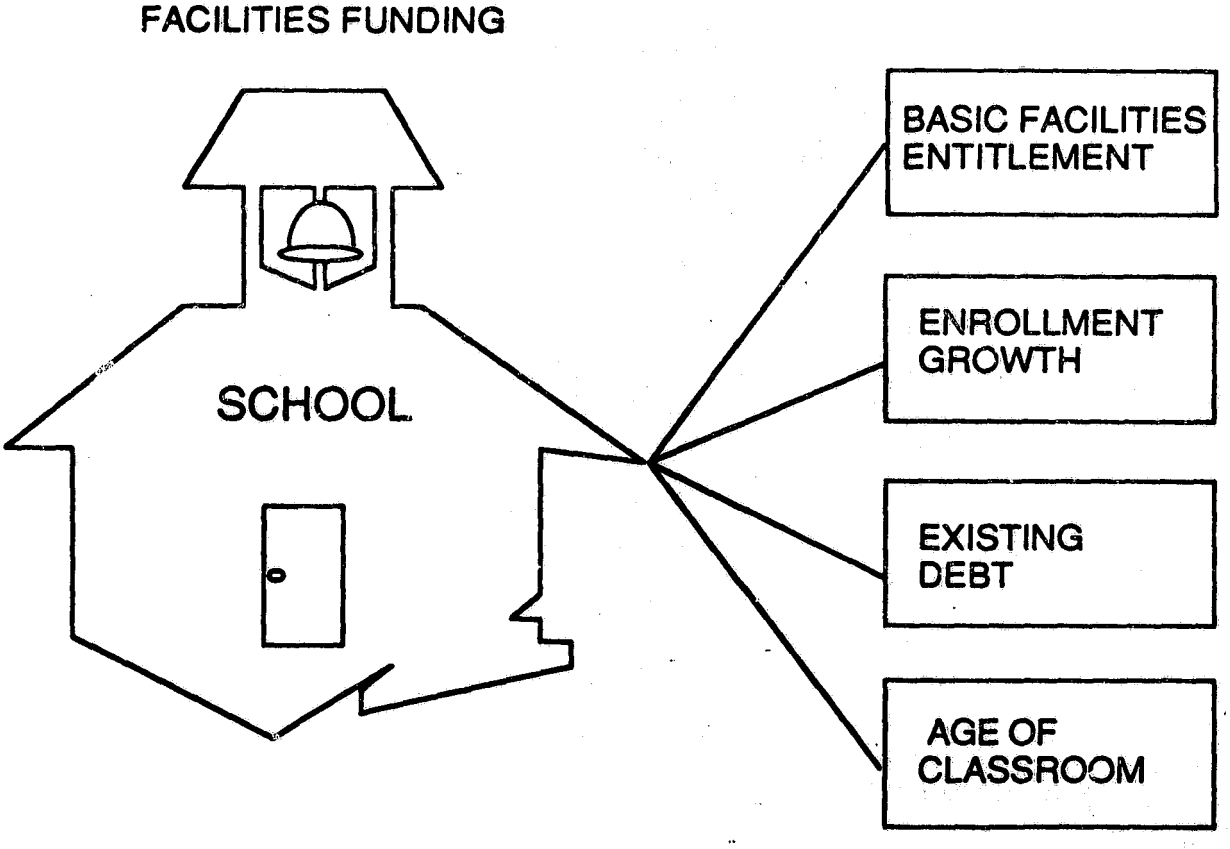

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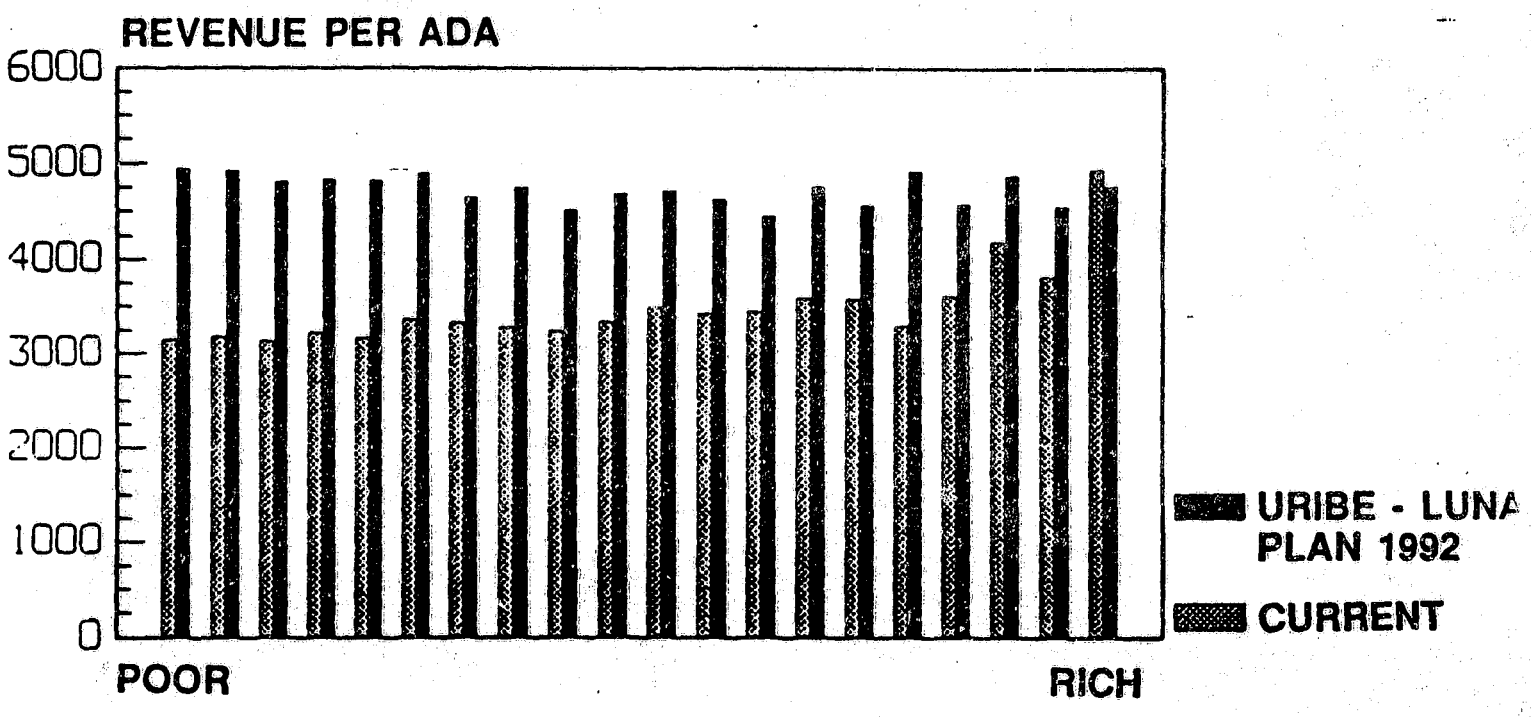
COMPARISON OF CURRENT FUNDING AND FUNDING PROPOSED UNDER THE URIBE - LUNA PLAN IN 1992



WEALTH GROUPS - WITH 5% OF STUDENTS IN EACH GROUP

What Are The Advantages of The Uribe - Luna Plan?

- **Will meet the test of constitutionality**
- Equalizes tax effort and yield for tax effort
- Eliminates the disparities between rich and poor districts; creates a common interest in all districts funding quality education
- Uses county tax bases to produce equity and efficiency with a similar amount of State money
- Uses guaranteed yield enrichment to promote local control
- Allows all children to benefit from all of the State's property wealth
- Allows school systems to maintain level of current funding for the next two years
- Provides for equalization of school facilities funding
- Use of county approach results in savings of $250 million in state taxes when compared to other approaches
- Provides school districts an additional $800 million in 1990-91; $1.6 billion in 1991-92; and $3 billion in 1992-93
- Maintains local school district discretion in the use of new state funding
- Increases level of funding for 99.5% of all students in the state

Technical Information/Important Numbers

- Sets county tax rate at 80¢
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- Changes the statewide local share for the Foundation portion from the current 33% to 50%
- Increases the Foundation School Program to the equivalent of a $2,300 per student basic allotment (up from the current $1,477)
- Increases the average State and local revenue from $3,100 per student to $4,000 per student in 1990-91 and $4,800 per student in 1992-93
- Maintains all other existing State school formulas e.g., cost of Education Index, small and sparse adjustments, and bilingual/ vocational/special education/compensatory education weights
- Allows every district to maintain its present revenue until 1992
- Equalizes available school funds to remain at the county level, as provided for in the Texas Constitution.

		3	4
WEALTH %	TOTAL STATE & LOCAL REV/ADA	16.001 (C)(2) REV/ADA A	16.001 (C)(2) REV/ADA B
100	50,000	8,000	4,000
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95	6,000	4,600	3,500
90	5,500	4,200	3,500
80	4,900	4,500	3,500
70	4,600	4,400	3,500
60	4,600	4,300	3,500
50	4,300	4,200	3,500
40	4,500	4,400	3,500
30	4,600	4,400	3,500
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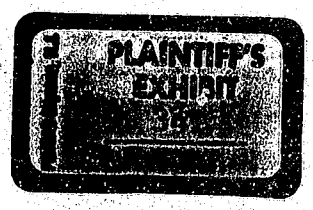
FOR 95%	AVG. 4,800	AVG. 4,300	AVG. 3,500



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OBS	FREQ	SDPV 91	PVADA 91
1	24	6,874,280,192	44,584
2	59	10,265,627,184	66,563
3	85	13,474,651,273	86,198
4	112	15,906,010,266	103,726
5	71	17,961,267,197	120,675
6	60	19,698,336,754	130,198
7	73	20,740,923,159	142,551
8	27	21,528,219,489	151,070
9	30	25,545,621,215	158,302
10	50	27,753,738,887	169,362
11	49	27,786,230,729	181,903
12	52	30,210,947,027	196,650
13	27	33,511,884,212	213,976
14	44	33,683,045,761	225,781
15	57	34,108,696,955	254,815
16	1	46,921,529,686	272,077
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REPLY

D 0378

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PLAINTIFF-APPELLANTS,

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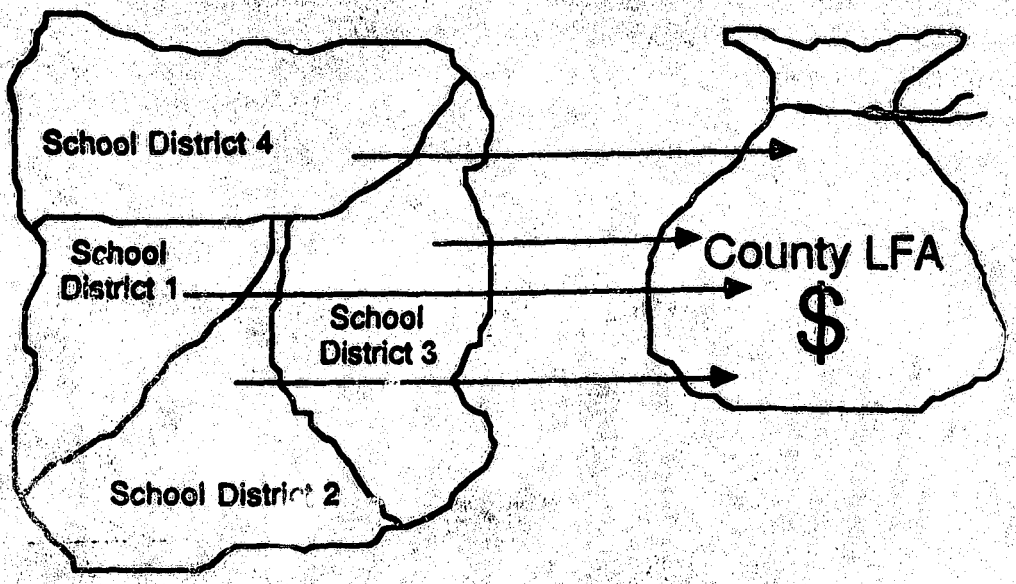

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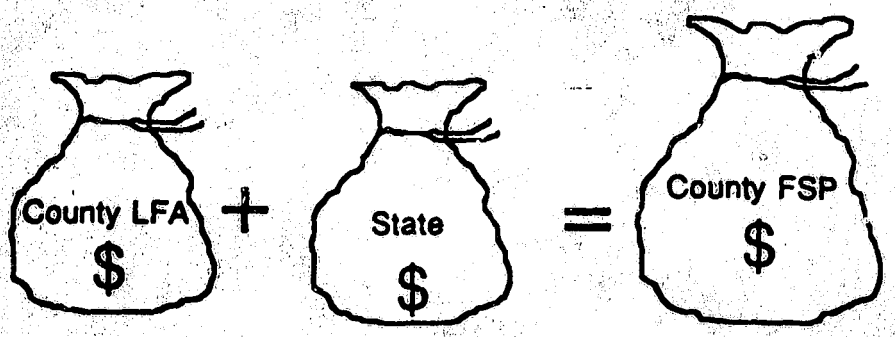

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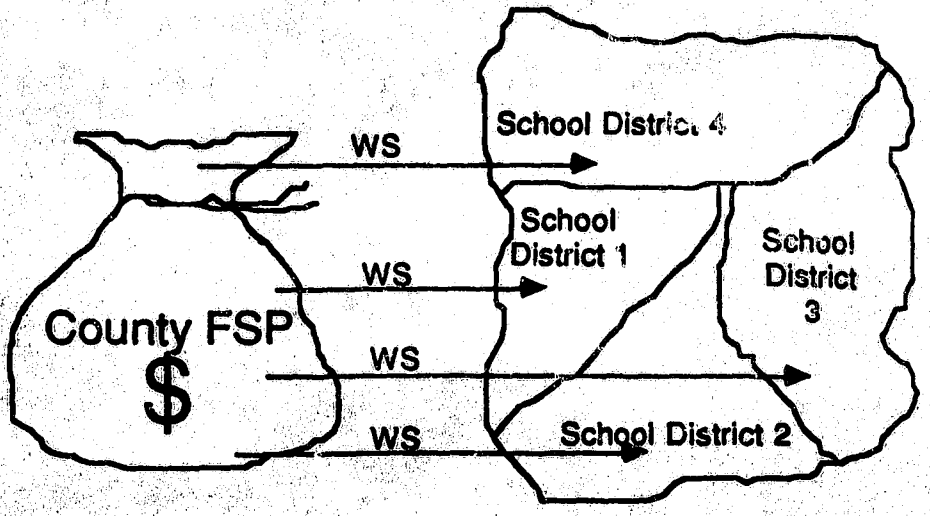

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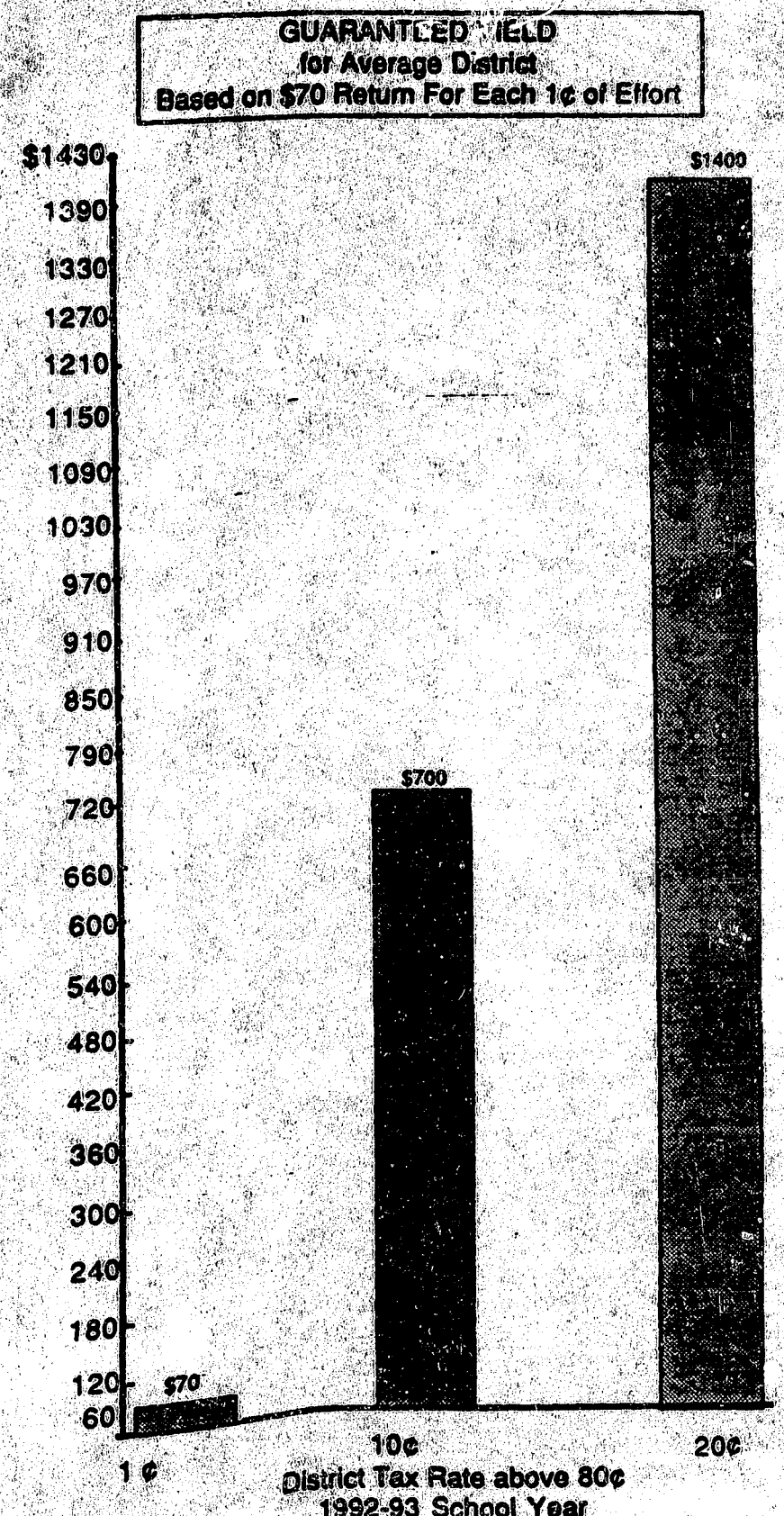

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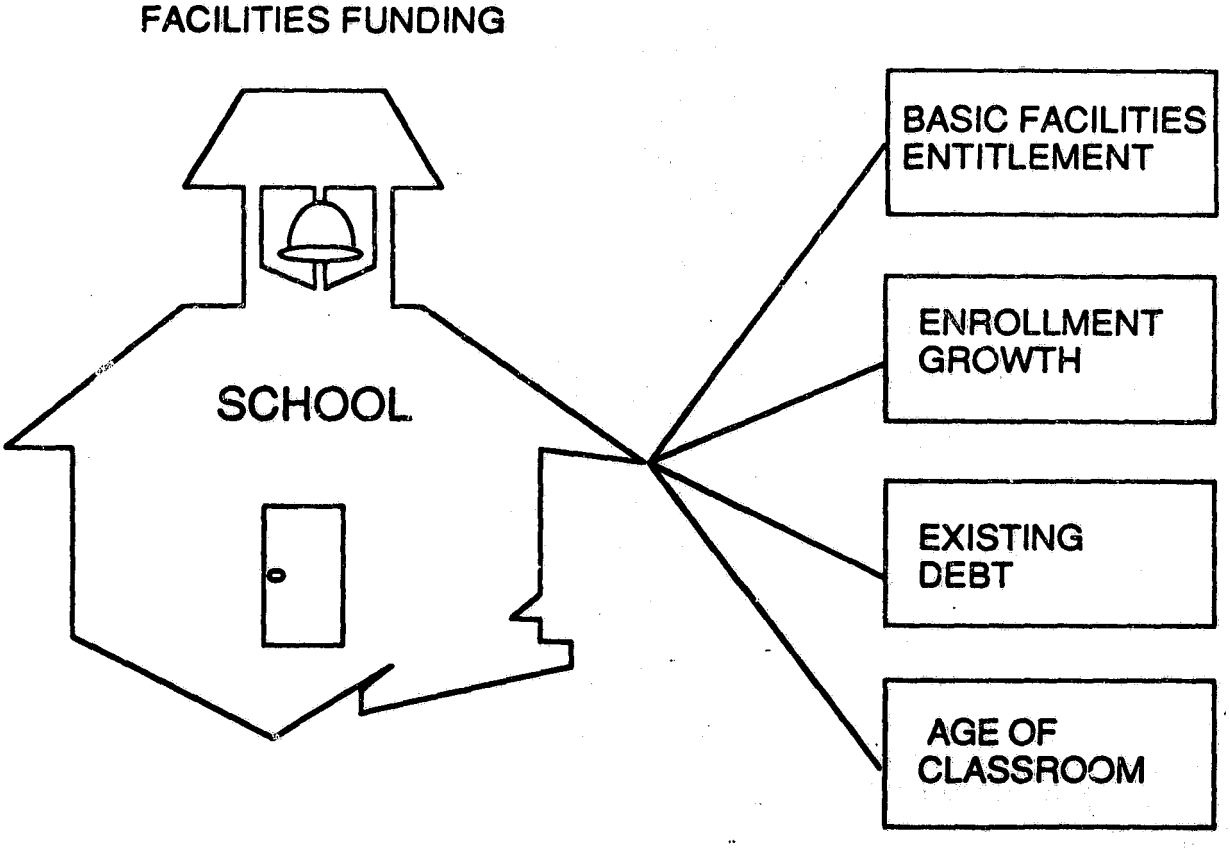

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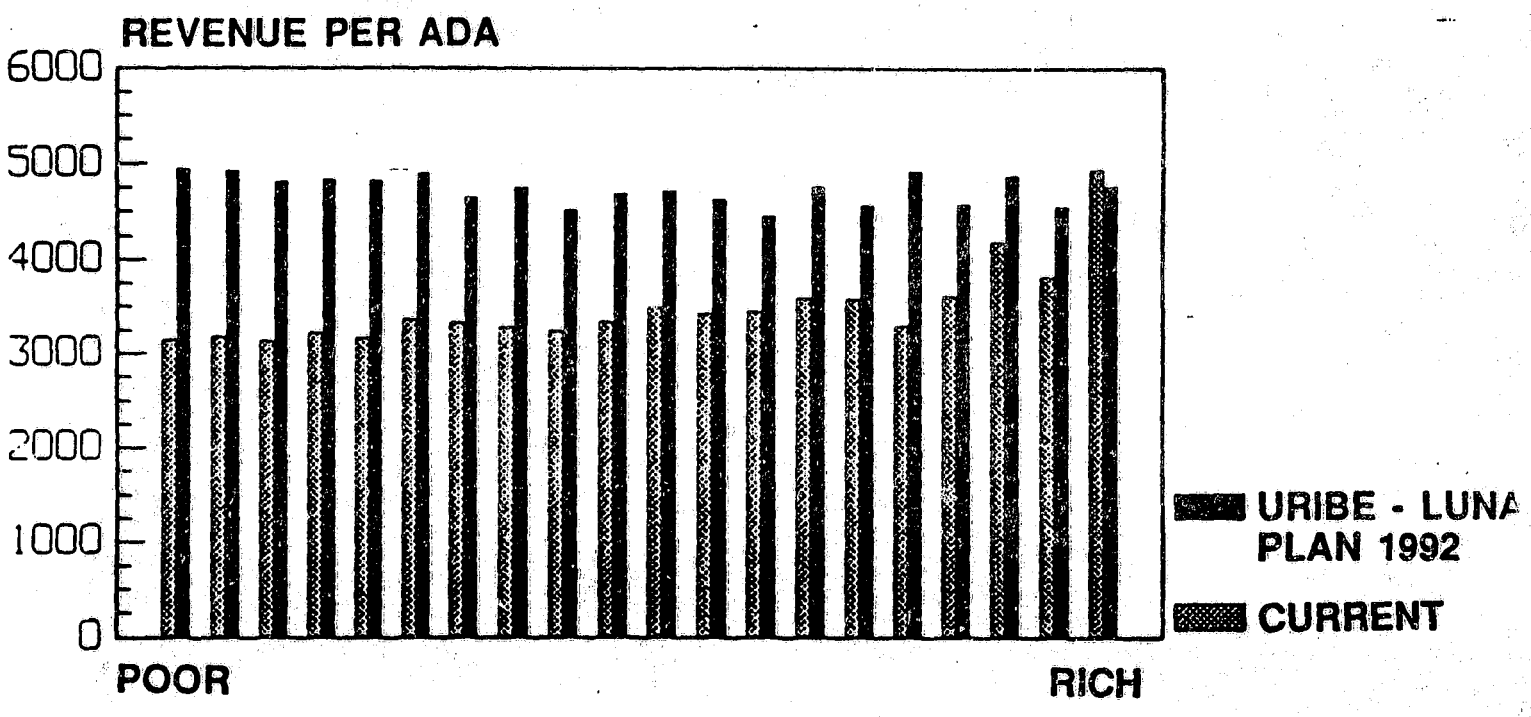

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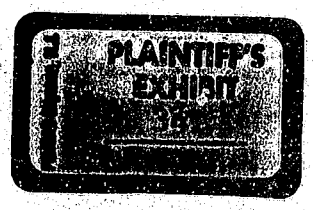

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NAMES OF ALL PARTIES

Plaintiffs: EDGEWOOD INDEPENDENT SCHOOL DISTRICT,
SOCORRO INDEPENDENT SCHOOL DISTRICT,
EAGLE PASS INDEPENDENT SCHOOL DISTRICT,
BROWNSVILLE INDEPENDENT SCHOOL DISTRICT,
SAN ELIZARIO INDEPENDENT SCHOOL DISTRICT,
SOUTH SAN ANTONIO INDEPENDENT SCHOOL DISTRICT,
LA VEGA INDEPENDENT SCHOOL DISTRICT,
PHARR-SAN JUAN-ALAMO INDEPENDENT SCHOOL DISTRICT,
KENEDY INDEPENDENT SCHOOL DISTRICT,
MILANO INDEPENDENT SCHOOL DISTRICT,
HARLANDALE INDEPENDENT SCHOOL DISTRICT, and
NORTH FOREST INDEPENDENT SCHOOL DISTRICT
on their own behalves, on behalf of the residents of their districts, and on behalf of other school districts and residents similarly situated;

ANICETO ALONZO on his own behalf and as next friend of SANTOS ALONZO, HERMELINDA ALONZO and JESUS ALONZO;

SHIRLEY ANDERSON on her own behalf and as next friend of DERRICK PRICE;

JUANITA ARREDONDO on her own behalf and as next friend of AUGUSTIN ARREDONDO, JR., NORA ARREDONDO and SYLVIA ARREDONDO;

MARY CANTU on her own behalf and as next friend of JOSE CANTU, JESUS CANTU and TONATIUH CANTU;

JOSEFINA CASTILLO on her own behalf and as next friend of MARIA CORENO;

EVA W. DELGADO on her own behalf and as next friend of OMAR DELGALO;

RAMONA DIAZ on her own behalf and as next friend of MANUEL DIAZ and NORMA DIAZ;

ANITA GANDARA, JOSE GANDARA, JR., on their own behalves and as next friend of LORRAINE GANDARA and JOSE GANDARA, III;

NICOLAS GARCIA on his own behalf and as next friend of NICOLAS GARCIA, JR., RUDOLFO GARCIA, ROLANDO GARCIA, GRACIELA GARCIA, CRISELDA GARCIA, and RIGOBERTO GARCIA;

RAQUEL GARCIA, on her own behalf and as next friend of FRANK GARCIA, JR., ROBERTO GARCIA, RICARDO GARCIA, ROXANNE GARCIA and RENE GARCIA;

HERMELINDA C. GONZALEZ on her own behalf and as next friend of ANGELICA MARIA GONZALEZ;

RICARDO J. MOLINA on his own behalf and as next friend of JOB FERNANDO MOLINA;

OPAL MAYO on her own behalf and as next friend of JOHN MAYO, SCOTT MAYO and REBECCA MAYO;

HILDA S. ORTIZ on her own behalf and as next friend of JUAN GABRIEL ORTIZ;

RUDY C. ORTIZ on his own behalf and as next friend of MICHELLE ORTIZ, ERIC ORTIZ and ELIZABETH ORTIZ;

ESTELA PADILLA and CARLOS PADILLA on their own behalves and as next friend of GABRIEL PADILLA;

ADOLFO PATINO on his own behalf and as next friend of ADOLFO PATINO, JR.;

ANTONIO Y. PINA on his own behalf and as next friend of ANTONIO PINA, JR., ALMA MIA PINA and ANA PINA;

REYMUNDO PEREZ on his own behalf and as next friend of RUBEN PEREZ, REYMUNDO PEREZ, JR., MONICA PEREZ, RAQUEL PEREZ, ROGELIO PEREZ and RICARDO PEREZ;

DEMETRIO RODRIGUEZ on his own behalf and as next friend of PATRICIA RODRIGUEZ and JAMES RODRIGUEZ;

LORENZO G. SOLIS on his own behalf and as next friend of JAVIER SOLIS and CYNTHIA SOLIS;

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BLANKET INDEPENDENT SCHOOL DISTRICT,

BURLESON INDEPENDENT SCHOOL DISTRICT,
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CHILTON INDEPENDENT SCHOOL DISTRICT,
COPPERAS COVE INDEPENDENT SCHOOL DISTRICT,
COVINGTON INDEPENDENT SCHOOL DISTRICT,
CRAWFORD INDEPENDENT SCHOOL DISTRICT,
CRYSTAL CITY INDEPENDENT SCHOOL DISTRICT,
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LA FERIA INDEPENDENT SCHOOL DISTRICT,
LA JOYA INDEPENDENT SCHOOL DISTRICT,
LAMPASAS INDEPENDENT SCHOOL DISTRICT,
LASARA INDEPENDENT SCHOOL DISTRICT,
LOCKHART INDEPENDENT SCHOOL DISTRICT,
LOS FRESNOS CONSOLIDATED INDEPENDENT SCHOOL DISTRICT,
LYFORD INDEPENDENT SCHOOL DISTRICT,
LYTLE INDEPENDENT SCHOOL DISTRICT,
MART INDEPENDENT SCHOOL DISTRICT,
MERCEDES INDEPENDENT SCHOOL DISTRICT,
MERIDIAN INDEPENDENT SCHOOL DISTRICT,
MISSION INDEPENDENT SCHOOL DISTRICT,
NAVASOTA INDEPENDENT SCHOOL DISTRICT,
ODEM-EDROY INDEPENDENT SCHOOL DISTRICT,
PALMER INDEPENDENT SCHOOL DISTRICT,
PRINCETON INDEPENDENT SCHOOL DISTRICT,
PROGRESSO INDEPENDENT SCHOOL DISTRICT,
RIO GRANDE CITY INDEPENDENT SCHOOL DISTRICT,
ROMA INDEPENDENT SCHOOL DISTRICT,
ROSEBUD-LOTT INDEPENDENT SCHOOL DISTRICT,
SAN ANTONIO INDEPENDENT SCHOOL DISTRICT,
SAN SABA INDEPENDENT SCHOOL DISTRICT,
SANTA MARIA INDEPENDENT SCHOOL DISTRICT,
SANTA ROSA INDEPENDENT SCHOOL DISTRICT,
SHALLOWATER INDEPENDENT SCHOOL DISTRICT,
SOUTHSIDE INDEPENDENT SCHOOL DISTRICT,
STAR INDEPENDENT SCHOOL DISTRICT,
STOCKDALE INDEPENDENT SCHOOL DISTRICT,
TRENTON INDEPENDENT SCHOOL DISTRICT,
VENUS INDEPENDENT SCHOOL DISTRICT,

WEATHERFORD INDEPENDENT SCHOOL DISTRICT,
YSLETA INDEPENDENT SCHOOL DISTRICT,
CONNIE DEMARSE,
H.B. HALBERT,
LIBBY LANCASTER,
JUDY ROBINSON,
FRANCES RODRIGUEZ, and ALICE SALAS

Defendants: WILLIAM N. KIRBY, INTERIM TEXAS COMMISSIONER OF EDUCATION;
THE TEXAS STATE BOARD OF EDUCATION;
MARK WHITE, GOVERNOR OF THE STATE OF TEXAS;
ROBERT BULLOCK, COMPTROLLER OF THE STATE OF TEXAS;
THE STATE OF TEXAS; and
JIM MATTOX, ATTORNEY GENERAL OF THE STATE OF TEXAS.

Defendant-Intervenors:

ANDREWS INDEPENDENT SCHOOL DISTRICT,
ARLINGTON INDEPENDENT SCHOOL DISTRICT,
AUSTWELL TIVOLI INDEPENDENT SCHOOL DISTRICT,
BECKVILLE INDEPENDENT SCHOOL DISTRICT,
CARROLLTON-FARMERS BRANCH INDEPENDENT SCHOOL DISTRICT,
CARTHAGE INDEPENDENT SCHOOL DISTRICT,
CLEBURNE INDEPENDENT SCHOOL DISTRICT,
COPPELL INDEPENDENT SCHOOL DISTRICT,
CROWLEY INDEPENDENT SCHOOL DISTRICT,
DESOTO INDEPENDENT SCHOOL DISTRICT,
DUNCANVILLE INDEPENDENT SCHOOL DISTRICT,
EAGLE MOUNTAIN-SAGINAW INDEPENDENT SCHOOL DISTRICT,
EANES INDEPENDENT SCHOOL DISTRICT,
EUSTACE INDEPENDENT SCHOOL DISTRICT,
GLASSCOCK INDEPENDENT SCHOOL DISTRICT,
GRAND PRAIRIE INDEPENDENT SCHOOL DISTRICT,
GRAPEVINE-COLLEYVILLE INDEPENDENT SCHOOL DISTRICT,
HARDIN JEFFERSON INDEPENDENT SCHOOL DISTRICT,
HAWKINS INDEPENDENT SCHOOL DISTRICT,
HIGHLAND PARK INDEPENDENT SCHOOL DISTRICT,
HURST EULESS BEDFORD INDEPENDENT SCHOOL DISTRICT,
IRAAN-SHEFFIELD INDEPENDENT SCHOOL DISTRICT,
IRVING INDEPENDENT SCHOOL DISTRICT,
KLONDIKE INDEPENDENT SCHOOL DISTRICT,
LAGO VISTA INDEPENDENT SCHOOL DISTRICT,
LAKE TRAVIS INDEPENDENT SCHOOL DISTRICT,
LANCASTER INDEPENDENT SCHOOL DISTRICT,
LONGVIEW INDEPENDENT SCHOOL DISTRICT,
MANSFIELD INDEPENDENT SCHOOL DISTRICT,

MCMULLEN INDEPENDENT SCHOOL DISTRICT,
MIAMI INDEPENDENT SCHOOL DISTRICT,
MIRANDO CITY INDEPENDENT SCHOOL DISTRICT,
NORTHWEST INDEPENDENT SCHOOL DISTRICT,
PINETREE INDEPENDENT SCHOOL DISTRICT,
PLANO INDEPENDENT SCHOOL DISTRICT,
PROSPER INDEPENDENT SCHOOL DISTRICT,
QUITMAN INDEPENDENT SCHOOL DISTRICT,
RAINS INDEPENDENT SCHOOL DISTRICT,
RANKIN INDEPENDENT SCHOOL DISTRICT,
RICHARDSON INDEPENDENT SCHOOL DISTRICT,
RIVIERA INDEPENDENT SCHOOL DISTRICT,
ROCKDALE INDEPENDENT SCHOOL DISTRICT,
SHELDON INDEPENDENT SCHOOL DISTRICT,
STANTON INDEPENDENT SCHOOL DISTRICT,
SUNNYVALE INDEPENDENT SCHOOL DISTRICT,
WILLIS INDEPENDENT SCHOOL DISTRICT, and
WINK-LOVING INDEPENDENT SCHOOL DISTRICT

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PRELIMINARY STATEMENT

On October 2, 1989, this Court declared the Texas school finance system to be unconstitutional. Edgewood v. Kirby, 777 S.W.2d 391 (Tex. 1989). This Court modified the original trial court judgment and extended the trial court's injunctive relief until May 1, 1990 in order to give the Texas Legislature an opportunity to enact a constitutional school finance system. Id., at 399. Senate Bill 1 was the legislature's response to this Court's mandate.

The trial court held further hearings to determine whether Senate Bill 1 met the requirements of this Court's mandate, and on September 24, 1990, declared that it did not. The trial court's judgment declared Senate Bill 1 to be unconstitutional. The Court vacated all previous injunctions, but ordered that it would entertain requests for further relief if the 72nd legislature failed to enact a constitutional plan with an effective date of September 1, 1990. This direct appeal from the trial court's judgment followed.

IN THE SUPREME COURT OF TEXAS

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.,	§	
PLAINTIFF-APPELLANTS,	§	NO. D-0378
V.	§	
WILLIAM N. KIRBY, ET AL.,	§	
DEFENDANT-APPELLEES.	§	

BRIEF OF PLAINTIFF-INTERVENORS

INTRODUCTORY STATEMENT

Plaintiff-Intervenors have been active participants in this litigation since its very early stages. At trial, Plaintiff-Intervenors presented the first witness and actively cross-examined each of the State's witnesses. Plaintiff-Intervenors have been aligned with the Plaintiffs throughout this litigation, and differ in this appeal only on the issue of the trial court's vacation of all prior injunctive relief and its refusal to grant injunctive relief at this time.

In this present appeal, Plaintiff-Intervenors are the only parties seeking affirmance of the trial court's judgment in its entirety. Thus, in the usual setting of an appeal, Plaintiff-Intervenors would be cast as Appellees. However, because of the expedited nature of this appeal, and the Court's very short time schedule for filing of briefs, Plaintiff-Intervenors have filed this initial brief anticipating that the State and the Defendant-Intervenors will by cross-points of error be attacking the trial court's judgment. Plaintiff-Intervenors have had to

guess at the points of error likely to be raised by the State and the Defendant-Intervenors, and wish to reserve the right to file a Reply Brief, if necessary, to respond to additional points of error raised by the State and Defendant-Intervenors if such cross-appeals are filed.

ARGUMENT

This case does not involve disputed material facts. Rather, it involves the proper application of the standards announced by this Court in Edgewood v. Kirby, 777 S.W.2d 391 (Tex. 1989), to a new fact situation: the enactment of Senate Bill 1 as the legislative response to this Court's order.

There is no significant dispute about the effects of Senate Bill 1:

(1) Senate Bill 1 excludes from its consideration the wealthiest districts in which 5% of the public school students of the state live.

(2) Senate Bill 1 excludes from its equalization plan any local revenues generated by local tax rate in excess of its targeted equalization rate. During the first year of its operation, this equalization rate is $.91 per one hundred dollars valuation. In the fifth and final year of the plan, this equalization rate is projected to be $1.18 per one hundred dollars valuation.

(3) Senate Bill 1 excludes from the equalization scheme expenditures by local districts for purposes deemed by "senior policy makers" to be in excess of those needed to fund an "adequate" education.

(4) Senate Bill 1 contains a "test for equalization" that in reality is meaningless. Senate Bill 1 allows for deviations from the equalized funding scheme as long as such deviations are not "statistically significant", yet no definition or context is given the term "statistically significant".

(5) Senate Bill 1 made no changes to existing school district boundary lines or tax bases.

(6) The district-by-district disparities noted by this Court in the original Edgewood opinion continue to exist under Senate Bill 1.

(7) The poor districts' ability to raise funds beyond the equalized level of spending contained in Senate Bill 1 is virtually non-existent.

(8) Although Senate Bill 1 enacts a host of changes to various provisions of state law, it continues the basic scheme for financing education in the state of Texas that existed at the time of the original Edgewood opinion.

(9) Senate Bill 1 does nothing regarding facilities other than to provide for a study of facility needs.

None of the conclusions listed above can be seriously disputed by the State or the Defendant-Intervenors. Rather, the thrust of

the Defendants' arguments has been that despite the existence of these deficiencies, Senate Bill 1 meets this Court's requirements as announced in the original opinion. Thus, this appeal involves little more than the application of that standard to undisputed facts. Plaintiff-Intervenors are confident that this Court will uphold the trial court's judgment that Senate Bill 1 continues the unconstitutional school financing scheme that has existed in Texas for many years.

1. The trial court correctly held that Senate Bill One's exclusion of districts and exclusion of revenues from its equalization plan failed to meet this Court's mandate of substantially equal access to education funding.

The Legislature chose to limit its equalization efforts contained in Senate Bill 1 to the 95th percentile of wealth, ignoring the 124 school districts in the upper wealth spectrum. It has offered no rationale to support this exclusion. We can only assume that the Legislature simply deemed it not worth the effort or too costly. No witness suggested that these districts within the upper 5% of wealth are all statistical anomalies. Quite the contrary, the record indicates that one does not encounter such statistical aberrations until approximately the 99th percentile of wealth. (Exhibit #208) Senate Bill 1 chose to ignore these districts of substantial wealth, and as the State's principal witness, Lynn Moak, testified, the State has not absorbed the "$300 million or $400 million of unequal . . . local enrichment" in

these top 5% districts. (SOF, Vol. IX at 1765)

The propriety of this exclusion is best determined by examining the mandate under which we operate. Judge Clark's declaratory judgment provided:

> . . . is UNCONSTITUTIONAL AND UNENFORCEABLE IN LAW because it fails to insure that each school district in this state has the same ability as every other district to obtain, by state legislative appropriation or by local taxation, or both, funds for educational expenditures, including facilities and equipment, such that each student, by and through his or her school district, would have the same opportunity to educational funds as every other student in the state . . . .

That judgment was affirmed "as modified" by this Court. The only modification that is relevant for our purposes appears near the end of this Court's opinion:

> There must be a direct and close correlation between a district's tax effort and the educational resources available to it; in other words, districts must have substantially equal access to similar revenues per pupil at similar levels of tax effort. Children who live in poor districts and children who live in rich districts must be afforded a substantially equal opportunity to have access to educational funds. Certainly, this much is required if the state is to educate its populace efficiently and provide for a general diffusion of knowledge statewide.

Edgewood, 777 S.W.2d at 397.

We have assumed, quite properly we believe, that the effect of this Court's order was to modify Judge Clark's judgment so that it would read as follows:

> . . . is UNCONSTITUTIONAL AND UNENFORCEABLE IN LAW because it fails to insure that each school district in this state has substantially the same ability as every other district to obtain, by state legislative appropriation or by local taxation, or both, funds for educational expenditures, including facilities and equipment, such that each student, by and through his or her school district, would have substantially the same opportunity to educational funds as every other student in the state . . . .

The exclusion of the wealthiest districts by Senate Bill 1 can be sustained, in our view, only if one further modifies Judge Clark's judgment to read as follows:

> . . . is UNCONSTITUTIONAL AND UNENFORCEABLE IN LAW because it fails to insure that most of the school districts in this State have substantially the same ability as most of the other districts to obtain by state legislative appropriation or by local taxation, or both, funds for educational expenditures, including facilities and equipment, such that most of the students, by and through his or her school district, would have substantially the same opportunity to educational funds as most of the other students in the state . . . .

This is a tortured reading of this Court's opinion, but it is the only one that could validate Senate Bill 1's exclusion of the wealthiest districts. Such a reading of the mandate is antithetical to the content of the opinion. This Court was at pains to say that "children who live in poor districts and children who live in rich districts must be afforded a substantially equal opportunity. . . ." Id., at 397.

This Court took specific note that: "The 100 poorest

districts had an average tax rate of 74.5 cents and spent an average of $2,978 per student. The 100 wealthiest districts had an average tax rate of 47 cents and spent an average of $7,23[illegible] per student." (Id., at 393) The State's equalized analysis would exclude all of the top 100 wealthiest districts in the State. This Court clearly viewed those districts to be relevant benchmarks for determining the equity of the existing system. Senate Bill 1 seeks to truncate the analysis of equity at a level which cannot be squared with either the language or the spirit of this Court's opinion.

Senate Bill 1 has an additional fundamental flaw: the exclusion of some school district revenues from the equalized system. This exclusion is contrary to the original judgment as modified by this Court's Opinion.

The State has urged that the provisions of Section 16.001(c)(1) are the guarantee of future equity in the State's funding system. This section purports to assure that the "yield of state and local educational program revenue" will not be significantly related to wealth for at least 95% of the students attending public schools. What is the nature of this assurance? Although there seems to be a certain amount of equivocation, we do know that this revenue target is something less than what the school districts, are in fact, spending. The witness Moak explained the legislative history surrounding the term "state and local educational program revenue" in these words:

. . . that the term itself was often referred

> to or phrases like this were often referred to as the astro turf factor, that there were programs, there were services that existed at the marginal edge of the overall structure of financing public school education which the state could include -- could choose not to include in this equalized financing system.

(SOF, Vol. IX at 1793). In his earlier testimony, Mr. Moak described the differences between Senate Bill 1 and the original House version of the bill in the following language:

> Certainly in the house version the system was being set automatically according to whatever school district -- it was perceived to be set automatically according to whatever school district levels were reached by the education community, and the -- under the senate version or under the conference committee version the -- senior state policymakers involved in state government were brought significantly into the process in a very major way.

(Id. at 1778-1779).

The Attorney General's Office characterized this change in the legislative approach with the following: "Stated another way, they didn't want to let the inmates run the institution." To his credit, Mr. Moak was unwilling to fully subscribe to this characterization of the legislative action. (Id. at 1779).

Nonetheless, it is abundantly clear that the term "state and local educational program revenue" is a term that can be modified biennially by "senior state policymakers" as they deem expedient. Purely in terms of statutory construction this provision is limited by the provisions of Section 16.202(b) (as added by Senate Bill 1) which provides "the Boards shall consider those costs and revenues

necessary for operation, maintenance, and administration and those costs necessary for adequate facilities and equipment and shall exclude all other costs." (emphasis added)

In order to validate Senate Bill 1's exclusion of some school district revenues from the equalized system, Judge Clark's Judgment would have to be further modified to read as follows:

> . . . is UNCONSTITUTIONAL AND UNENFORCEABLE IN LAW because it fails to insure that most of the school districts in this State have substantially the samo ability as most of the other districts to obtain by state legislative appropriation or by local taxation, or both, funds for some educational expenditures, including facilities and equipment, such that most of the students, by and through his or her school district, would have substantially the same opportunity to some educational funds as most of the other students in the state. . . .

This is an even more tortured reading of this Court's Opinion, but such a reading is necessary to validate both the exclusion of the wealthiest districts, and the exclusion of some existing revenues from the equalized system. Clearly, this tortured reading cannot be squared with this Court's opinion.

The State seems hoist by its own petard. On the one hand it wishes to justify the inequities in the system under the rubric of local control. Thus we are asked to tolerate the huge disparities in expenditures between the rich and poor districts on varying arguments: the rich districts' educational experimentation will be a lighthouse for all other districts, or their expenditures are simply in response to what their parents want for their school

system and, because those parents are more ambitious, it is not reasonable for the kids in poor districts to have similar aspirations.

On the other hand, the State wants this Court to ignore the fact that the enrichments available to the students in these rich districts are simply unavailable to the children in the poor districts, because the enrichment monies that are not equalized under Senate Bill 1 remain solely dependent upon local tax bases. Indeed, the witness Moak conceded this point:

> Q: So the poorest districts are really effectively capped at this time in terms of once they get up to the limit of the state system they really have nowhere to go in order to really enrich their program; is that right?
>
> A: In terms of the overall system, as we have discussed it, they can receive very little money from additional revenue or additional tax effort above whatever the equalized tax effort is of the system.
>
> Q: And between the $1.18 [the equalized target level of Senate Bill 1 at full implementation] and $1.50 [the constitutional maximum local tax rate for school districts] Edcouch-Elsa, which is in the 95th percent of the bottom, can raise $64, and Plano, which is within the 95th percent, can raise $1200. Is this about right?
>
> A: I will accept that.

(SOF, Vol. XII at 2388-2389). The students' misfortune to live in poor districts continues to determine the nature of their educational experience.

If we must honor these local decisions concerning the nature of the educational experience of the district's children, we must

honor them totally. These local decisions must be given equal weight in determining the appropriate levels of equalization.

Efficiency/equalization is the dominant constitutional theme. The State may not subordinate that goal to some notion that expenditures within the wealthy districts are not really necessary for educational purposes. The Texas Education Code in Section 20.48 authorizes districts to spend funds for purposes "necessary in the conduct of the public schools to be determined by the Board of Trustees." There is no justification to exclude from the equalized system any lawful expenditures made by local school boards. Local school officials are simply officers of the State aiding in discharging the State's educational responsibilities. Webb County v. Board of Trustees, 95 Tex. 131 (1901). Any system of equalization must honor the collective decision-making process by these State officers.

Nothing in this Court's opinion suggests that its mandate of efficiency/equality was to be modified by some limited notion of proper educational expenditures. Indeed, quite the contrary. The Court specifically noted that "high-wealth districts are able to provide for their students broader educational experiences including more extensive curricula, more up-to-date technological equipment . . . The differences in the quality of educational programs offered are dramatic. For example, San Elizario I.S.D. offers no foreign language, no pre-kindergarten program, no chemistry, no physics, no calculus, and no college preparatory or honors program. It offers virtually no extra-curricular activities

such as band, debate, or football." Edgewood v. Kirby, 777 S.W.2d at 393.

To the extent Senate Bill 1 permits or requires the exclusion of any authorized expenditure from the equalized formula, it is antithetical to the premise of this Court's mandate. So long as the children living in the poor districts continue to have no opportunity to obtain an education that includes choices beyond the basics, and that opportunity remains unavailable solely because of the existing disparities in tax bases, the system will remain fundamentally and unconstitutionally flawed.

This point was virtually conceded by the State's principal witness. After testifying about the historic pattern of funding by the legislature, the witness Moak then gave this revealing testimony:

> You must seek some way of reducing F [unequalized local enrichment].[1] As long as F has a mechanism to continue to increase, you must seek some way to absorb F.
>
> If you leave F simply in place, the patterns of school finance that Allen Barnes and Richard Hooker and Dr. Cardenas and I have all independently looked at for years tend to stay remarkably constant.

(SOF, Vol. IX at 1620-21).

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[1] Throughout the trial the various witnesses have referred to the different components of state and local funding according to the schematic contained in the chart which is the appendix to the trial court's opinion. The component labeled "F" is local unequalized enrichment, also sometimes referred to as "Tier 3".

2. The trial court properly held that Senate Bill One's "statistically significant" standard for determination of deviations from substantially equal access was in fact no standard at all.

The State proffered two statistical witnesses to bolster the claim that any significant funding disparities would be ferreted out by its "statistically significant" analysis. This testimony, as well as the testimony by the witness Moak, leaves us with the uncomfortable conclusion that the State is attempting to resurrect an analysis of the system that was specifically rejected by Judge Clark and later by this Court. Throughout the earlier stages of this case, the State argued that one could not fairly judge the system by engaging in any district-by-district analysis of funding disparities. The State urged upon the courts an analysis that looked at blocks of students and disregarded any district-by-district analysis. This Court rejected this narrow analysis and accepted the plaintiffs' view that one must look at district comparisons in order to fairly understand how the system operates. Thus, the Court was at pains to note the differences between Highland Park and Wilmer-Hutchins in Dallas County and Deer Park and North Forest in Harris County. Edgewood v. Kirby, 777 S.W.2d at 393. Of course, it is the districts themselves that represent the true environment in which students are educated in the public schools of Texas.

It is apparent that the statistical measures contemplated by the State under Senate Bill 1 would conceal the interdistrict disparities that persuaded this Court that the existing funding

system was unconstitutional. As acknowledged by the witness Moak in describing the shortcomings of Senate Bill 1:

> You may have in District A, if you are going to compare District A to District B and make a series of interdistrict comparisons, and if that's the standard, well, then, I would agree you have a problem.

(SOF, Vol. IX at 1763-1764).

This "problem" will never be revealed by the State's statistical analysis.

3. The trial court properly held that Senate Bill One's plan for funding equalization was in fact no more than a plan to make a plan at some time in the future.

The State has claimed that Senate Bill 1 is so amorphous that it cannot at this evolutionary stage be the subject of judicial scrutiny. At first blush this argument, akin to ripeness, seems plausible. On reflection, however, this very lack of substance is a central failure on the part of the Legislature to honor the mandate of this Court.

The Court's message was: "The legislature is duty-bound to provide for an efficient system of education . . . ." Id., at 399. Recognizing the "enormity of the task", the Court modified "the trial court's judgment so as to stay the effect of its injunction until May 1, 1990" and then proceeded to "affirm the trial court's judgment as modified." Id. The trial court's injunction had provided that "in the event the Legislature enacts

a constitutionally sufficient plan . . . this injunction is further stayed until September 1, 1990. . . . ."

Under the terms of these orders the Legislature was required to enact "a constitutionally sufficient plan"[2] and "provide for an efficient system of education." In the process, the Court admonished the Legislature: "More money allocated under the present system would reduce some of the existing disparities between districts but would at best only postpone the reform that is necessary to make the system efficient. A band-aid will not suffice; the system itself must be changed." Id. at 397.

At a minimum these court orders envisioned the creation of a legislative product that was capable of evaluation. Indeed, how else can this Court determine whether there has been compliance with its mandate? Yet when the trial court questioned the Attorney General's Office with respect to the meaning of the central term of the equalization provisions of Senate Bill 1, to wit "educational program revenue", the dialogue was as follows:

---

[2]To borrow from another arena in which the courts have required the formulation of a plan:

> A desegregation plan must promise meaningful and immediate progress toward disestablishing state-imposed segregation. "The burden on a school board today is to come forward with a plan that promises realistically to work and promises realistically to work now." Green v. County School Board, 391 U.S. 430, 439, 88 S.Ct. 1689, 1694, 20 L.Ed.2d 716 (1968) (emphasis in original).

Tasby v. Wright, 542 F.Supp. 135, 136 (N.D. Tex. 1981).

> THE COURT: And Mr. O'Hanlon, what's the attorney general's official statement as to how this statute is to be construed as to what educational program revenue means and where you --
>
> MR. O'HANLON: The educational program revenue means in terms of how we are going to look at it. It is not defined. What the point of this is, is that the Foundation School Fund Budget Committee is going to define it in terms of their studies.

(SOF, Vol. IX at 1797).

The most we know about the legislative product is that some more money has been committed in 1990-91 to a funding formula which differs in no meaningful respect from the previously declared unconstitutional House Bill 72. We know that Senate Bill 1 creates new layers of bureaucracy to study and report and that these reports may ultimately result in some modifications in the current funding formula. At the threshold, the legislative product fails to satisfy the Court's mandate of an "efficient system" and a "constitutionally sufficient plan."

Undoubtedly this argument overlaps the other arguments. Nonetheless, we believe the argument has independent vitality in light of the outstanding court decrees. The absence of a plan capable of evaluation, is in and of itself, a significant deficiency in the legislative product. The State argues that we cannot know at this time what this system will look like at the time of fruition. The Court did not order the Legislature to study the matter further and report back five years hence. Rather, the Legislature was enjoined to produce a constitutionally sufficient plan by May 1, 1990--a plan that was capable of evaluation by the

judiciary and one that provided some measure of assurance to the poor school districts of Texas so that they can make plans for their educational program beyond each legislative biennium. The failure of the Legislature to produce a verifiable plan taints the entire legislative product.

CONCLUSION

The legislature in enacting Senate Bill 1 failed to heed this Court's admonition that "[m]ore money allocated under the present system . . . . would at best only postpone the reform that is necessary to make the system efficient. A band-aid will not suffice; the system itself must be changed." Edgewood v. Kirby, 777 S.W.2d at 397. (emphasis added)

The trial court correctly interpreted Senate Bill 1 in light of this Court's mandate. Senate Bill 1 is nothing more then the band-aid this Court specifically stated would not suffice. The system has not been changed.

While Plaintiff-Intervenors want the enactment and implementaion of a constitutionally sufficient plan of school finance with all due speed, Plaintiff-Intervenors chose not to seek at the trial court an injunction for the current school year because of its disruptive effect. Nor do Plaintiff-Intervenors complain of the trial court's refusal to grant an injunction involving the current school year. Plaintiff-Intervenors do feel, however, that it is extremely important that the Court resolve the issue quickly so as to give the legislature a strong and clear

signal that the Court meant what it originally said, and that the system must be fixed, and fixed now.

PRAYER FOR RELIEF

Wherefore, premises considered, Plaintiff-Intervenors pray that the trial court's judgment be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Brief of Plaintiff-Intervenors, has been sent, via certified mail, return receipt requested, to Ms. Toni Hunter, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711-2548, to Mr. Kevin O'Hanlon, at the Texas Education Agency, 1701 North Congress, Austin, Texas 78701, to Mr. Robert E. Luna, at the Law Offices of Earl Luna, P.C., 4411 North Central Expressway, Dallas, Texas 75205, to Mr. Jerry Hoodenpyle, at Rohne, Hoodenpyle, Lobert, & Myers, 1323 W. Pioneer Parkway, Spur 303, P.O. Box 13010, Arlington, Texas 76004-0010, and to Mr. Albert H. Kauffman, at MALDEF, 140 E. Houston Street, Suite 300, San Antonio, Texas 78205, on this, the 5 day of November, 1990.

Richard E. Gray, III

D 0378 DIRECT APPEAL

NO. D-0378

IN THE

SUPREME COURT OF TEXAS

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.,

Appellants

V.

WILLIAM N. KIRBY, ET AL.,

Appellees

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November 15, 1990

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NO. D-0378

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LIST OF NAMES OF PARTIES

The following is a complete list of the names of all Defendant-Intervenors to the trial court's final judgment and the names and addresses of all Defendant-Intervenors' trial counsel:

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Defendant-Intervenors, Eanes I.S.D., et al.: Eanes Independent School District, Arlington Independent School District, Eagle Mountain-Saginaw Independent School District, Glen Rose Independent School District, Grapevine-Colleyville Independent School District, Hurst-Euless-Bedford Independent School District, Lago Vista Independent School District and Rockdale Independent School District.

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LIST OF AUTHORITIES

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STATUTES

TEX. R. APP. PROC.

NO. D-0378

IN THE

SUPREME COURT OF TEXAS

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.,

Appellants

V.

WILLIAM N. KIRBY, ET AL.,

Appellees

RESPONSE OF APPELLEES ANDREWS I.S.D., ET AL. TO APPELLANTS' BRIEF

TO THE HONORABLE SUPREME COURT OF TEXAS:

NOW COME Appellees, Andrews Independent School District, Carrollton-Farmers Branch Independent School District, Coppell Independent School District, Duncanville Independent School District, Hawkins Independent School District, Highland Park Independent School District, Iraan-Sheffield Independent School District, Plano Independent School District, Rains Independent School District, Richardson Independent School District and Wink-Loving Independent School District, Defendant-Intervenors in the trial court in Cause No. 362,516 in the 250th District Court of Travis County, Texas, file this, their Response to Appellants' Brief, and for such would respectfully show the Court the following:

STATEMENT OF THE NATURE OF THE CASE

Appellants Edgewood I.S.D., et al., Plaintiffs below, won the trial of this case. Plaintiffs succeeded in having Senate Bill 1 declared unconstitutional. Nevertheless, the Plaintiffs have appealed directly to the Supreme Court on the limited grounds that their requested injunctive relief to close the public schools of Texas was denied, and further on the grounds that the trial court denied a portion of their legal fees which the court found to be $151,196.87 through appeal. On the other hand, the Plaintiff-Intervenors have not perfected an appeal from any part of the trial court's judgment, but rather they seek affirmance of the judgment in its entirety (Brief of Plaintiff-Intervenors, p. 1).

REPLY TO STATEMENT OF JURISDICTION

The Supreme Court should decline jurisdiction to allow a direct appeal in this case because (1) the Cost Bond filed by Appellants on October 11, 1990, does not list any of the Appellants, but instead lists one of the attorneys of record as the Appellant, and (2) this direct appeal involves questions of fact contrary to Rule 140(b) of the Texas Rules of Appellate Procedure. This direct appeal should therefore be dismissed.

Argument and Authorities

1. The Cost Bond filed by Appellants on October 11, 1990, does not list any of the Appellants, but instead states that one of the attorneys of record is the Appellant. The requirements

for bond for costs on appeal in civil cases is set forth in Rule 46 of the Texas Rules of Appellate Procedure and states:

> Rule 46(a). Cost Bond
>
> Unless excused by law, the appellant shall execute a bond payable to the appellee in the sum of $1000 unless the court fixes a different amount upon its own motion or motion of either party or any interested officer of the court.

Nowhere in the rule does it permit an attorney to list himself as the Appellant. The Appellants in this case have not posted a bond within the thirty day time period required by Rule 41(a)(1) of the Texas Rules of Appellate Procedure.

Argument and Authorities

2. This direct appeal involves questions of fact contrary to Rule 140(b) of the Texas Rules of Appellate Procedure. The Texas Rules of Appellate Procedure, as amended effective September 1, 1990 regarding Direct Appeals to the Supreme Court, read in relevant part as follows:

> Rule 140. Direct Appeals
>
> (a) Application. This rule governs direct appeals to the Supreme Court authorized by the Constitution and by statute. The rules governing appeals to the courts of appeals apply to direct appeals to the Supreme Court except when inconsistent with statute or this rule.
>
> (b) Jurisdiction. The Supreme Court may not take jurisdiction over a direct appeal from the decision of any court other than a district court or county court, or of any question of fact. The Supreme Court may

> decline to exercise jurisdiction over a direct appeal of an interlocutory order if the record is not adequately developed, or if its decision would be advisory, or if the case is not of such importance to the jurisprudence of the state that a direct appeal should be allowed. (Emphasis added.)

Because fact questions are integral to this direct appeal, the Supreme Court should decline jurisdiction under Rule 140(b) of the Texas Rules of Appellate Procedure.

The jurisdiction of the Texas Supreme Court on direct appeal is a limited one. Gardner v. Railroad Comm., 333 S.W.2d 585, 588 (Tex. 1960). This direct appeal is in lieu of an appeal to the Court of Appeals, and must be upon questions of law only. If the case involves the determination of any contested issue of fact, the Court is without jurisdiction to consider the appeal. See Dodgen v. Depuglio, 209 S.W.2d 588, 592 (Tex. 1948).

The case at bar necessarily involved the presentation of evidence in the trial court by the Plaintiffs and Plaintiff-Intervenors in an attempt to overcome the strong presumption of constitutionality. The Plaintiffs continue to present facts and argue the trial record in their Appellants brief. Facts are argued in their brief at pages 7 (a "summary" of the record), 8, 9, 10, 11, 12, 13, 17 and 31. The Statement of Facts is argued at pages 9, (footnote 5), 11 (three times), 12, 33 and 34. Specific trial exhibits are argued at pages 9, (footnote 5), 11

(three times), 12 (three times), 13 (5 times), 35 (twice), 36 (twice) and 45. Appellants also attempt to "supplement" the factual discussion with a reference to Tab 2 of the appendix, which is the Plaintiffs' proposed Findings of Fact and Conclusions of Law, at page 7, (footnote 2) of Appellants' brief. Testimony of Appellants' own witnesses is argued at pages 12 (Barnes), and 17 (footnote 9) (Hooker and Barnes) of Appellants' brief. There is also a general discussion of evidence introduced by Plaintiffs on the effects of Senate Bill 1 at various tax rates at page 13 of Appellants' brief. None of these factual references relate to the issues of jurisdiction (page 6 of brief) or of abuse of discretion (page 24 of brief). The Appellants demonstrate through their brief that this appeal does involve contested issues of fact in violation of Rule 140.

For example, on page 9 of Appellants' Brief, Appellants argue the meaning of Plaintiffs' Exhibit 34, what the exhibit shows, and that a witness testified that each one of these circumstances would meet the standards of Senate Bill 1. Appellants then cite to the Statement of Facts. However, a review of the Statement of Facts cited shows that the witness never used the wording ascribed to him by Appellants. Rather, the witness is engaged in cross-examination over a series of hypothetical data. The witness disagreed with "levels" of cost as shown and stated that his interpretation was that Senate Bill 1 deals with "categories" of costs. (Statement of Facts,

p. 2368, l. 12-21.) The witness further considered the proposed scenarios to be unlikely based on studies that had been done. (Statement of Facts, p. 2369, l. 1-3.) The witness further testified that the examples should not occur (Statement of Facts, p. 2369, l. 20-21), and that other scenarios would not be correct under his interpretation. (Statement of Facts, p. 2370, l. 23-25.) The record shows a factual dispute regarding the very issues which counsel would paint as uncontested matters of fact.

Appellants further offer as an "uncontested fact" the allegation that Senate Bill 1 contains no provision for facilities. (Appellants' Brief, p. 10.) This interpretation misconstrues Senate Bill 1, as shown by the testimony of the state's expert witness, Lynn Moak. Senate Bill 1 does provide for facilities and equipment in the "second tier" of its formula. (Statement of Facts, p. 1848, l. 24 - p. 1849, l. 1.) Senate Bill 1 also authorized facilities funding beginning with the 1991-92 school year (Statement of Facts, p. 1894, l. 12-14), and provides a mechanism beginning with the 1993-94 school year by which the maximum guaranteed level of qualified state and local funds per student is automatically increased by the cost of equipment and facilities. (Statement of Facts, p. 1894, l. 17 - p. 1895, l. 8.) Clearly, fact issues were presented.

Appellants contend on page 11 of their brief that the method of counting students will be changed and will result c

an average 2½% loss of funding to districts. Appellants contend that such limitations in Senate Bill 1 made it so vague as to be no plan at all. However, the Statement of Facts shows that there is a contested fact issue because the state's expert witness, Lynn Moak, showed that there was no vagueness at all in the bill in that regard, only that changes in ADA calculations were made to eliminate abuses of the system. For example, districts in the Houston area had reportedly given away Astro World tickets to encourage attendance during the targeted four week period. (Statement of Facts, p. 1946, l. 17-24.) Mr. Moak further testified that the change in ADA calculation would not disportionately affect school districts of any wealth group. (Statement of Facts, p. 1947, l. 14-21, p. 1948, l. 20 - p. 1949, l. 1.)

Even Plaintiffs' own expert witness, Dr. Richard Hooker, demonstrated that a question of fact exists as to whether or not Senate Bill 1 would work. Dr. Hooker was unable to testify to the Court that the Senate Bill 1 could not work as it was designed to work over its five year period. (Statement of Facts, p. 445, l. 11-17.)

The Appellees, Andrews I.S.D., et al., and Defendant-Intervenors Eanes I.S.D., et al., have previously deposited cash in lieu of a Cost Bond for an appeal to the Third Court of Appeals. An orderly disposition of this case would be to allow

the Court of Appeals to consider the factual aspects of this appeal first, and then to allow the Supreme Court to rule on the final issues of law. For all of the above reasons, this direct appeal should be dismissed.

REPLY POINT

REPLY POINT 1. The district court was correct in refusing to enter an injunction on May 1, 1990, and in refusing to enjoin Senate Bill 1 during the 1990-91 school year and for 1991-92 and later school years. (Reply to Points of Error 1, 2 and 3.)

BRIEF OF THE ARGUMENT

REPLY POINT 1 RESTATED: The district court was correct in refusing to enter an injunction on May 1, 1990, and in refusing to enjoin Senate Bill 1 during the 1990-91 school year and for 1991-92 and later school years. (Reply to Points of Error 1, 2 and 3.)

Argument and Authorities

The grant or refusal of an injunction is ordinarily within the sound discretion of the trial judge, and his action will be reversed only when a clear abuse of that discretion is shown. Repka, et al. v. American National Ins. Co., 186 S.W.2d 977, 981 (Tex. 1945). The scope of appellate review is limited to the narrow question of whether the action of the trial judge in granting or denying the injunction constituted a clear abuse of discretion. Janus Films, Inc. v. City of Fort Worth, 358 S.W.2d 589 (Tex. 1962). In light of the above principle governing the

issuance of the writ, it will be seen there are various elements in each case which must be weighed by the trial judge in the exercise of his discretion in the granting or refusal of the writ. Repka, supra at 981. The courts will deny equitable injunctive relief to a complaining party, if by balancing the equities between him and the general public, more harm and inequities would follow to the many than to the complaining one, if the relief were to be granted. Hogue v. City of Bowie, 209 S.W.2d 807, 809 (C.C.A. Fort Worth, 1948; writ ref. n.r.e.). The trial court judge was entitled to consider the disruptive effect of such an injunction on the schools of Texas in order to reach his decision. The trial judge also had to consider the fact that there is total disagreement on the question of an injunction between the Plaintiffs and Plaintiff-Intervenors. The latter group did not support the Plaintiffs' request for injunctive relief, and maintain that position in this direct appeal. Plaintiff-Intervenors cite as their reason an injunction's disruptive effect (Plaintiff-Intervenors' Brief, p. 17). There is no evidence of an abuse of discretion on the part of the trial court. The Plaintiffs' Points of Error 1, 2 and 3 should be denied.

Even though the trial court refused to order a specific remedy, the Appellants urge that the Supreme Court order the district court to implement one of several alternative remedies

suggested by the Appellants (Brief, p. 45). Various alternatives from imposition of the Uribe/Luna plan to county wide taxing jurisdictions are discussed in Appellants' Brief on pages 2, 16, 25 - 33 (Uribe/Luna), 45, and 46. However, it is not within the scope of the jurisdiction of the Supreme Court to direct the trial court in that regard. Such a request is the equivalent of an application for a mandamus to compel the district court to order one of the alternatives. As such, the Supreme Court does not have jurisdiction on direct appeal. Halbouty v. Railroad Commission of Texas, et al., 357 S.W.2d 364, 366-368 (Tex. 1962), cert. denied 83 S.Ct. 185, 371 U.S. 889. The Court in Halbouty went on to say that even a combination of two complaints in one cause would not serve to give the Supreme Court jurisdiction in a direct appeal of one of the complaints where otherwise jurisdiction would not attach.

CROSS POINT

If the Supreme Court determines that it does have jurisdiction of this direct appeal, Appellees Andrews I.S.D., et al. respectfully request that this Court consider the following cross point of error:

CROSS POINT 1. The District Court erred in finding Senate Bill 1 unconstitutional. The trial court's Opinion is based on assumptions involving facts not yet in existence on a bill not in effect.

BRIEF OF THE ARGUMENT

CROSS POINT 1 RESTATED: The District Court erred in finding Senate Bill 1 unconstitutional. The trial court's Opinion is based on assumptions involving facts not yet in existence on a bill not in effect.

Argument and Authorities

In the field of constitutional law, no stronger presumption exists than that which favors the validity of a statute. Vernon v. State, 406 S.W.2d 236, 242 (C.C.A., Corpus Christi 1966; writ ref. n.r.e.). The burden rests on the individual who challenges the act to establish its unconstitutionality. In Re Johnson, 554 S.W.2d 775, 779 (C.C.A., Corpus Christi 1977; writ ref. n.r.e.). Every possible presumption obtains in favor of constitutionality of a statute until the contrary is shown beyond a reasonable doubt, and if a statute is susceptible of construction which would render it constitutional or unconstitutional, it is the court's duty to give it the construction that sustains its validity. Commissioners Court of Lubbock County v. Martin, 471 S.W.2d 100, 105 (C.C.A., Amarillo 1971; writ ref. n.r.e.).

Senate Bill 1 is to be implemented over a five year period beginning September 1, 1990. Suit was filed on or about June 27, 1990, some two months before Senate Bill 1 became effective on September 1, 1990. Trial of the case was held July 9 through 24, 1990, approximately five weeks before the bill

became effective. A statute performs no function whatsoever until its effective date. Highland Park I.S.D. v. Loring, 323 S.W.2d 469 (C.C.A. Dallas, 1959; no writ). Significant data, including local school tax rates under the new bill, was not available. The trial court's Opinion is based on assumptions involving facts not yet in existence on a bill not in effect. The trial court erred in its Opinion, which is also designated as the court's findings of fact and conclusions of law (Opinion, p. 1), when it states "Parts of Senate Bill 1 are destined to fail." (Opinion, p. 7.) (Emphasis added.) A court cannot "presume" that the bill will be violated. See Jenkins v. Autry, 256 S.W.2d 672, 674 (C.C.A., Amarillo 1923; writ dism'd.).

Because of the status of the bill and facts when tried, the Court's judgment is an advisory opinion. It is well settled that courts may not give advisory opinions, even by a request for declaratory judgment. Alamo Express v. Union City Transfer, 309 S.W.2d 815, 827 (Tex. 1958).

The trial court erred in declaring Senate Bill 1 unconstitutional in view of the great presumption of its constitutionality, and the court's consideration of "presumptions" and the "destiny" of a bill not in effect.

CONCLUSION

WHEREFORE, Appellees Andrews Independent School District, et al., request that this Honorable Court dismiss the direct

appeal of Appellants Edgewood Independent School District, et al., or in the alternative, reverse the judgment of the trial court and hold Senate Bill 1 constitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the attached and foregoing Response of Appellees Andrews I.S.D., et al. to Appellants' Brief, has been served on all attorneys of record by Federal Express on the 15th day of November, 1990, enclosed in wrappers properly addressed as follows:

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Edgewood/Brief 2
EDGEWD

D 0378 DIRECT APPEAL

NO. D-0378

IN THE SUPREME COURT OF TEXAS

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.,

PLAINTIFF-APPELLANTS,

V.

WILLIAM N. KIRBY, ET AL.,

DEFENDANT-APPELLEES.

Cause No. 362,516
In the 250th Judicial District Court
of Travis County, Texas

BRIEF OF DEFENDANT-INTERVENORS

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ATTORNEYS FOR APPELLEES/
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EANES I.S.D., ET AL.

NAMES OF ALL PARTIES

Plaintiffs: EDGEWOOD INDEPENDENT SCHOOL DISTRICT,
SOCORRO INDEPENDENT SCHOOL DISTRICT,
EAGLE PASS INDEPENDENT SCHOOL DISTRICT,
BROWNSVILLE INDEPENDENT SCHOOL DISTRICT,
SAN ELIZARIO INDEPENDENT SCHOOL DISTRICT,
SOUTH SAN ANTONIO INDEPENDENT SCHOOL DISTRICT,
LA VEGA INDEPENDENT SCHOOL DISTRICT,
PHARR-SAN JUAN-ALAMO INDEPENDENT SCHOOL DISTRICT,
KENEDY INDEPENDENT SCHOOL DISTRICT,
MILANO INDEPENDENT SCHOOL DISTRICT,
HARLANDALE INDEPENDENT SCHOOL DISTRICT, and
NORTH FOREST INDEPENDENT SCHOOL DISTRICT
on their own behalves, on behalf of the residents of their districts, and on behalf of other school districts and residents similarly situated;

ANICETO ALONZO on his own behalf and as next friend of SANTOS ALONZO, HERMELINDA ALONZO and JESUS ALONZO;

SHIRLEY ANDERSON on her own behalf and as next friend of DERRICK PRICE:

JUANITA ARREDONDO on her own behalf and as next friend of AUGUSTIN ARREDONDO, JR., NORA ARREDONDO and SYLVIA ARREDONDO;

MARY CANTU on her own behalf and as next friend of JOSE CANTU, JESUS CANTU and TONATIUH CANTU;

JOSEFINA CASTILLO on her own behalf and as next friend of MARIA CORENO;

EVA W. DELGADO on her own behalf and as next friend of OMAR DELGADO;

RAMONA DIAZ on her own behalf and as next friend of MANUEL DIAZ and NORMA DIAZ;

ANITA GANDARA and JOSE GANDARA, JR. on their own behalves and as next friend of LORRAINE GANDARA and JOSE GANDARA, III;

NICOLAS GARCIA on his own behalf and as next friend of NICOLAS GARCIA, JR., RODOLFO GARCIA, ROLANDO GARCIA, GRACIELA GARCIA, CRISELDA GARCIA, and RIGOBERTO GARCIA;

RAQUEL GARCIA on her own behalf and as next friend of FRANK GARCIA, JR., ROBERTO GARCIA, RICARDO GARCIA, ROXANNE GARCIA and RENE GARCIA;

HERMELINDA C. GONZALEZ on her own behalf and as next friend of ANGELICA MARIA GONZALEZ;

RICARDO J. MOLINA on his own behalf and as next friend of JOB FERNANDO MOLINA;

OPAL MAYO on her own behalf and as next friend of JOHN MAYO, SCOTT MAYO and REBECCA MAYO;

HILDA S. ORTIZ on her own behalf and as next friend of JUAN GABRIEL ORTIZ;

RUDY C. ORTIZ on his own behalf and as next friend of MICHELLE ORTIZ, ERIC ORTIZ and ELIZABETH ORTIZ;

ESTELA PADILLA and CARLOS PADILLA on their own behalves and as next friend of GABRIEL PADILLA;

ADOLFO PATINO on his own behalf and as next friend of ADOLFO PATINO, JR.;

ANTONIO Y. PINA on his own behalf and as next friend of ANTONIO PINA, JR., ALMA MIA PINA and ANA PINA;

REYMUNDO PEREZ on his own behalf and as next friend of RUBEN PEREZ, REYMUNDO PEREZ, JR., MONICA PEREZ, RAQUEL PEREZ, ROGELIO PEREZ and RICARDO PEREZ;

DEMETRIO RODRIGUEZ on his own behalf and as next friend of PATRICIA RODRIGUEZ and JAMES RODRIGUEZ;

LORENZO G. SOLIS on his own behalf and as next friend of JAVIER SOLIS and CYNTHIA SOLIS;

JOSE A. VILLALON on his own behalf and as next friend of RUBEN VILLALON, RENE VILLALON, MARIA CHRISTINA VILLALON and JAIME VILLALON.

Plaintiff-Intervenors:

ALVARADO INDEPENDENT SCHOOL DISTRICT,
BLANKET INDEPENDENT SCHOOL DISTRICT,
BURLESON INDEPENDENT SCHOOL DISTRICT,
CANUTILLO INDEPENDENT SCHOOL DISTRICT,
CHILTON INDEPENDENT SCHOOL DISTRICT,

COPPERAS COVE INDEPENDENT SCHOOL DISTRICT,
COVINGTON INDEPENDENT SCHOOL DISTRICT,
CRAWFORD INDEPENDENT SCHOOL DISTRICT,
CRYSTAL CITY INDEPENDENT SCHOOL DISTRICT,
EARLY INDEPENDENT SCHOOL DISTRICT,
EDCOUCH-ELSA INDEPENDENT SCHOOL DISTRICT,
EVANT INDEPENDENT SCHOOL DISTRICT,
FABENS INDEPENDENT SCHOOL DISTRICT,
FARWELL INDEPENDENT SCHOOL DISTRICT,
GODLEY INDEPENDENT SCHOOL DISTRICT,
GOLDTHWAITE INDEPENDENT SCHOOL DISTRICT,
GRANDVIEW INDEPENDENT SCHOOL DISTRICT,
HICO INDEPENDENT SCHOOL DISTRICT,
JIM HOGG INDEPENDENT SCHOOL DISTRICT,
HUTTO INDEPENDENT SCHOOL DISTRICT,
JARRELL INDEPENDENT SCHOOL DISTRICT,
JONESBORO INDEPENDENT SCHOOL DISTRICT,
KARNES CITY INDEPENDENT SCHOOL DISTRICT,
LA FERIA INDEPENDENT SCHOOL DISTRICT,
LA JOYA INDEPENDENT SCHOOL DISTRICT,
LAMPASAS INDEPENDENT SCHOOL DISTRICT,
LASARA INDEPENDENT SCHOOL DISTRICT,
LOCKHART INDEPENDENT SCHOOL DISTRICT,
LOS FRESNOS CONSOLIDATED INDEPENDENT SCHOOL DISTRICT,
LYFORD INDEPENDENT SCHOOL DISTRICT,
LYTLE INDEPENDENT SCHOOL DISTRICT,
MART INDEPENDENT SCHOOL DISTRICT,
MERCEDES INDEPENDENT SCHOOL DISTRICT,
MERIDIAN INDEPENDENT SCHOOL DISTRICT,
MISSION INDEPENDENT SCHOOL DISTRICT,
NAVASOTA INDEPENDENT SCHOOL DISTRICT,
ODEM-EDROY INDEPENDENT SCHOOL DISTRICT,
PALMER INDEPENDENT SCHOOL DISTRICT,
PRINCETON INDEPENDENT SCHOOL DISTRICT,.
PROGRESSO INDEPENDENT SCHOOL DISTRICT,
RIO GRANDE CITY INDEPENDENT SCHOOL DISTRICT,
ROMA INDEPENDENT SCHOOL DISTRICT,
ROSEBUD-LOTT INDEPENDENT SCHOOL DISTRICT,
SAN ANTONIO INDEPENDENT SCHOOL DISTRICT,
SAN SABA INDEPENDENT SCHOOL DISTRICT,
SANTA MARIA INDEPENDENT SCHOOL DISTRICT,
SANTA ROSA INDEPENDENT SCHOOL DISTRICT,
SHALLOWATER INDEPENDENT SCHOOL DISTRICT,
SOUTHSIDE INDEPENDENT SCHOOL DISTRICT,
STAR INDEPENDENT SCHOOL DISTRICT,
STOCKDALE INDEPENDENT SCHOOL DISTRICT,
TRENTON INDEPENDENT SCHOOL DISTRICT,
VENUS INDEPENDENT SCHOOL DISTRICT,
WEATHERFORD INDEPENDENT SCHOOL DISTRICT,
YSLETA INDEPENDENT SCHOOL DISTRICT,

CONNIE DEMARSE,
H. B. HALBERT,
LIBBY LANCASTER,
JUDY ROBINSON,
FRANCES RODRIGUEZ, and ALICE SALAS.

Defendants: WILLIAM N. KIRBY, INTERIM TEXAS COMMISSIONER OF EDUCATION;
THE TEXAS STATE BOARD OF EDUCATION;
BILL CLEMENTS, GOVERNOR OF THE STATE OF TEXAS;
ROBERT BULLOCK, COMPTROLLER OF THE STATE OF TEXAS;
THE STATE OF TEXAS; and
JIM MATTOX, ATTORNEY GENERAL OF THE STATE OF TEXAS.

Defendant-Intervenors:

ANDREWS INDEPENDENT SCHOOL DISTRICT,
ARLINGTON INDEPENDENT SCHOOL DISTRICT,
CARROLLTON-FARMERS BRANCH INDEPENDENT SCHOOL DISTRICT,
CLEBURNE INDEPENDENT SCHOOL DISTRICT,
COPPELL INDEPENDENT SCHOOL DISTRICT,
DUNCANVILLE INDEPENDENT SCHOOL DISTRICT,
EAGLE MOUNTAIN-SAGINAW INDEPENDENT SCHOOL DISTRICT,
EANES INDEPENDENT SCHOOL DISTRICT,
GLEN ROSE INDEPENDENT SCHOOL DISTRICT,
GRAPEVINE-COLLEYVILLE INDEPENDENT SCHOOL DISTRICT,
HAWKINS INDEPENDENT SCHOOL DISTRICT,
HIGHLAND PARK INDEPENDENT SCHOOL DISTRICT,
HURST-EULESS-BEDFORD INDEPENDENT SCHOOL DISTRICT,
IRAAN-SHEFFIELD INDEPENDENT SCHOOL DISTRICT,
LAGO VISTA INDEPENDENT SCHOOL DISTRICT,
PLANO INDEPENDENT SCHOOL DISTRICT,
RAINS INDEPENDENT SCHOOL DISTRICT,
RICHARDSON INDEPENDENT SCHOOL DISTRICT,
ROCKDALE INDEPENDENT SCHOOL DISTRICT, and
WINK-LOVING INDEPENDENT SCHOOL DISTRICT.

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TABLE OF AUTHORITIES

CASES

CASES

STATUTES AND REGULATIONS

LAW REVIEWS

NO. D-0378

IN THE

SUPREME COURT OF TEXAS

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.,

Petitioners,

V.

WILLIAM N. KIRBY, ET AL.,

Respondents.

BRIEF OF DEFENDANT-INTERVENORS, EANES I.S.D. ET AL.

STATEMENT OF THE CASE

The Texas Supreme Court declared the Texas school finance system to be unconstitutional, based on state constitutional law, on October 2, 1989. Edgewood v. Kirby, 777 S.W.2d 391 (Tex. 1989). The Supreme Court, in so acting, not only modified the trial court judgment, but it extended the trial court's deadlines for injunctive relief in order to give the Texas Legislature an opportunity to implement a school finance system meeting judicial scrutiny.

The Texas Legislature made a good faith effort to meet the Supreme Court's scrutiny. Senate Bill 1 was passed by both the Senate and the House of Representatives and approved by the Governor and was designed to meet the requirements of the Supreme Court's decision in Edgewood.

Immediately upon the passage of Senate Bill 1, Defendants and Defendant-Intervenors complained of the new Bill, prior to its even being implemented. The trial court held a trial lasting over two weeks to determine whether Senate Bill 1 was constitutional.

The Plaintiffs sought to enjoin Senate Bill 1 during the 1990-1991 school year and later years and requested the court to implement the Master's plan for 1990-1991 and to implement an alternative plan for 1991-1992. The Plaintiff-Intervenors requested a declaration of unconstitutionality, but did not request injunctive relief. On September 24, 1990, the trial court rendered its opinion that Senate Bill 1 was not constitutional. In its order and opinion, the court vacated all previous injunctions and denied Plaintiffs' request for injunctive relief, but stated that it would consider injunctive relief if the Legislature failed to enact a constitutional plan with an effective date of September 1, 1991.

Although successful at the trial court level, Plaintiffs appealed the District Court judgment directly to the Supreme Court of Texas, complaining only of the trial court's remedy, its denial of injunctive relief, not the constitutionality of the statute. The Defendant-Intervenors have perfected their appeal to the Court of Appeals regarding the constitutionality of S.B.1. On October 24, 1990, the Supreme Court noted probable jurisdiction and set the matter for oral argument on November 28, 1990.

JURISDICTIONAL STATEMENT

It is the duty of the Attorney General to defend the constitutionality of Senate Bill 1. That is not Defendant-Intervenors' purpose in filing this brief. Rather, Defendant-Intervenors are filing this brief in order to bring to the Court's attention the fact that the Court does not have jurisdiction over this matter at this time.

This jurisdictional issue must be addressed before this Court can address either the constitutionality of the statute or can consider whether or not to affirm or overturn the trial court's denial of an injunction.

ARGUMENT

I. THE SUPREME COURT LACKS JURISDICTION TO HEAR THIS DIRECT APPEAL.

A. This direct appeal does not meet the constitutional or statutory requirements for a direct appeal to the Supreme Court.

The Texas Supreme Court has always strictly interpreted the constitutional and statutory requirements for a direct appeal. Martinez v. Rodriguez, 608 S.W.2d 162 (Tex. 1980). It is significant that in Martinez the Texas Supreme Court dismissed the appeal for want of jurisdiction because the order of the trial court denying the temporary injunction made no mention of the validity or invalidity of the administrative order complained of in the suit. Because the order denying the injunction made no mention of the

validity or invalidity of the underlying order, the Supreme Court determined that it had no jurisdiction.

The trial court's order denying the injunction was not based "on the grounds of" the constitutionality of the statute. Tex. Const. art. V, section 3-b, as approved by the voters of Texas in 1940, states that,

> The legislature shall have the power to provide by law, for an appeal direct to the Supreme Court of this state from an order of any trial court granting or denying an interlocutory or permanent injunction on the grounds of the constitutionality or unconstitutionality of any statute of this state.... (Emphasis added.)

The Texas statute implementing the constitutional amendment is TEX. GOV'T. CODE ANN. § 22.001. Appellants rely on section (c) of that statute which states,

> An appeal may be taken directly to the Supreme Court from an order of a trial court granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of a statute of this state. (Emphasis added.)

This Court has said that the jurisdiction of the Supreme Court on a direct appeal is dependent upon and limited to the wording of the constitutional amendment, Article V, section 3-b, and the statute implementing same. Halbouty v. Railroad Commission of Texas, 357 S.W.2d 364 (Tex. 1962).

As recently amended, Rule 140 of the Texas Rules of Appellate Procedure no longer carries the statutory language found in TEX. GOV'T. CODE ANN. § 22.001. The rule as amended no longer speaks to the constitutional and statutory reasons upon which

jurisdiction is based. Therefore, the constitutional provision and statutory language are controlling.

Obviously, the constitutional amendment and statute contemplate appeals where injunctions are denied because the trial court determined a statute was constitutional, or where injunctions are granted because the trial court determined a statute was unconstitutional. Neither is the case here. This is a case where the Appellants prevailed in the determination that the statute was unconstitutional, yet still want to directly appeal because they did not obtain their requested injunctive relief. The subject matter of Appellants' appeal is the denial of the injunction, not the unconstitutionality of the statute.

As previously stated by the Supreme Court of Texas,

> For us to have jurisdiction of a direct appeal, it must appear that a question of the constitutionality of a Texas statute . . . was properly raised in a trial court, that such question was determined by the order of such court granting or denying an interlocutory or permanent injunction, and that the question is presented to this court for decision.

Bryson v. High Plains Underground Water Conservation District, 297 S.W.2d 117, 119 (Tex. 1956) (emphasis added); See also, Lipscomb v. Flaherty, 264 S.W.2d 691 (Tex. 1954); Corona v. Garrison, 274 S.W.2d 541 (Tex. 1955).

For the Supreme Court to have jurisdiction, the trial court's order granting or denying the injunction must be based on the grounds of the constitutionality or unconstitutionality of a statute. The ground of the order granting or denying the injunction

must be the constitutionality or unconstitutionality of the statute, not the denial of the injunction. As in this case, this Court in Gardner v. Railroad Commission of Texas, 333 S.W.2d 585 (Tex. 1960), held that where the injunction was denied not on the ground of the validity of the statute, but on some other ground, this Court had no jurisdiction. See also, Mitchell v. Purolator Security, Inc., 515 S.W.2d 101 (Tex. 1974).

The trial court in the case at bar determined that the Texas system of public education financing as evidenced by Senate Bill 1 was unconstitutional. However, the trial court declined to grant an injunction based on that determination of unconstitutionality. The court's reason for denying the injunction was strictly for public policy reasons. As the court stated,

> To insure an orderly transition, districts must continue to operate. Regardless of the court's declaration of the unconstitutionality of the Texas school financing system, nothing in the court's judgment shall be construed as prohibiting the state or districts from taking any action authorized by statute or excusing them from taking any action required by statute. (Emphasis added.) (Final judgment at pages 3-4.)

As the court stated in its opinion, public policy reasons, not constitutionality, mandated the denial of an injunction. The court pointed out various reasons for refusing to grant the injunction, including the separation of powers doctrine, Texas Constitution article II, section 1. In addition, the court noted that it is the duty of the legislature to establish and make suitable provisions for the efficient system of education, not the

duty of the courts. The court also noted that, given the enormity of the task of establishing an efficient system of school finance, "Judicial patience with the efforts of its sister branches of government is required." (Judge Scott McCown's Opinion at pages 37-38.)

Finally, and most importantly, as the court stated,

> ...the court is also loath to act because its options are so unattractive. Cutting off all funds to force legislative action throws the process of education into chaos and it does damage to both students and teachers. Furthermore, cutting off funds imperils the credit of the state because of the contractual obligations of the districts. These problems can become severe quickly if a stubborn legislature or governor refuse to act.
>
> A judicially imposed remedy has its own problems. Courts are not designed to legislate or administer and cannot appropriate money. Any judicial remedy would, therefore, be less effective when implemented than a legislative solution. Undoubtedly, judicial action is far less desirable than legislative action. (Judge Scott McCown's Opinion at pages 38-39.)

Obviously, the court did not base its decision to deny the injunction on the ground that the statute is unconstitutional or constitutional, as required by the Texas constitution and statute authorizing a direct appeal. While admitting that the statute was unconstitutional, the court chose, however, in spite of such decision, to deny the injunction for purely public policy reasons, to avoid chaos and to continue to educate the children of the State of Texas.

As also noted in the Halbouty case cited above, the issue of the constitutionality of the statute must be presented to the Supreme Court on direct appeal by the Appellants. That issue is not presented by Appellants in this direct appeal. Rather, Appellants have prevailed in the issue regarding the constitutionality of the statute and do not bring that issue to the court for its consideration.

Appellants/Plaintiffs and Plaintiff-Intervenors cannot then be allowed to file a direct appeal to the Supreme Court in order to circumvent the appellate process rather than following the proper appellate route of allowing Appellees/Defendants and Defendant-Intervenors to appeal the trial court decision to the Court of Appeals. Defendants and Defendant-Intervenors should be the Appellants, and should be allowed to appeal the constitutionality of the statute to the Court of Appeals.

It should be noted that Appellants cite no cases for their authority to seek a direct appeal. That is because no cases support Appellants' legal theory for seeking a direct appeal. Because the issue of the constitutionality of the statute is not presented to the Supreme Court at this time, this case is not ripe for a direct appeal to the Supreme Court. See Gibraltar Savings Association v. Falkner, 351 S.W.2d 534 (Tex. 1961).

When the Supreme Court obtains direct appeal jurisdiction to consider an order involving the constitutionality of a statute, its jurisdiction extends only to a resolution of that particular issue of the statute's constitutionality. State v. Spartan's Industries Inc., 447 S.W.2d 407 (Tex. 1969); Halbouty, Id.

In the case on appeal, the constitutionality has not ever been appealed by Appellants. Yet, that is the only issue on which this Court could have jurisdiction on a direct appeal.

B. Appellants' requested remedy is in the nature of a mandamus, over which this Court does not have direct appeal jurisdiction.

The Texas Supreme Court does not have jurisdiction over this case on appeal because the Texas Supreme Court only has direct appeal jurisdiction over injunction orders. It does not have direct appeal jurisdiction over mandamus orders or requests for mandamus. Tex. Const. art. V, section 3-b; TEX. GOV'T. CODE ANN. § 22.001; Pope v. Ferguson, 445 S.W.2d 950, 952 (Tex. 1969).

Stated another way, the Supreme Court is only vested with direct appeal jurisdiction from orders granting or denying orders which prevent action. If either the trial court order or the Supreme Court decision reversing that decision would have the effect of compelling affirmative action, then a direct appeal is prohibited. Halbouty, Id.; Boston v. Garrison, 256 S.W.2d 67 (Tex. 1953); Sales and Cliff, Jurisdiction in the Texas Supreme Court and Courts of Civil Appeals, 26 Baylor L. Rev. 502, 522, 523 (1974).

Although Appellants have styled their request for relief as an "injunction," it is not really in the nature of an injunction, but is actually in the nature of a mandamus. The functions of an injunction are to restrain a motion and enforce inaction.

The functions of mandamus, on the other hand, are to set in motion and compel action. Boston, Id.; Halbouty, Id.

Although Appellants have styled their request as a request for an injunction, it is very obvious from reading Appellants' brief that what they are actually asking for is affirmative action, or a mandamus. Appellants have requested this Court to order the District Court to implement the Uribe/Luna plan. Obviously, when the Supreme Court orders a district court to do something, it is in the nature of a mandamus action. Likewise, when the Supreme Court orders another court to implement a specific plan, that is also in the nature of a mandamus. Further, by the implementation of the Uribe/Luna plan, Appellants would request this Supreme Court to order county-wide consolidation of taxing jurisdictions. Ignoring the fact that such county-wide consolidation is certainly unconstitutional, it is also certainly in the nature of a mandamus action; it is not injunctive relief.

While Appellants expound theoretical for pages regarding potential federal positions regarding injunctions, Appellants fail to cite any Texas cases which would allow the Texas Supreme Court to act in the manner requested by the Appellants. The reason no Texas cases are cited is because there are no Texas cases which allow the Supreme Court to take such action. Such action would be in the nature of a mandamus and is not allowed under direct appeal to the Supreme Court.

C. There are numerous issues of material fact in the present appeal.

As stated by Texas Rule of Appellate Procedure 140(b), if any questions of fact remain in the case, then the Supreme Court may not take the case on direct appeal. Many issues of material fact remain in this case. Therefore, the Supreme Court lacks jurisdiction to hear this direct appeal.

Some of the numerous fact issues which remain in this case, are: what is the meaning of "statistically significant;" the internal mechanisms of Senate Bill 1; the financial impact of Senate Bill 1 on all school districts in the state; and whether or not under Senate Bill 1, districts have substantially equal access to similar revenue per pupil at similar levels of tax effort.

Even the Attorney General, while purporting to request this Court to accept jurisdiction of this case, admits that there may be fact issues that remain to be resolved by the Court of Appeals. (State Appellees-Defendants' Response to Appellants'-Plaintiffs' Statement of Jurisdiction, at page 3.)

D. The Supreme Court does not have jurisdiction to oversee specifics of its general mandate.

Appellants' reliance on Bilbo Freight Lines, Inc. v. Texas, 645 S.W.2d 925 (Tex. App.--Austin 1983, no writ) and Conley v. Anderson, 164 S.W. 985 (Tex. 1913) is ill-placed. First, the proper issue raised on direct appeal by Appellants is the trial court's refusal to grant an injunction, not the constitutionality of the statute.

Second, the trial court did follow the Supreme Court's mandate to minimize disruption of school children's educations. It was not the intent of the Texas Supreme Court in Edgewood to disrupt the educational process of all school children in Texas.

This court recognized, "...the enormity of the task now facing the legislature," and stated that it wanted, "...to avoid any sudden disruption in the education process...." Edgewood, at 399. (Emphasis added.) The trial court did follow the Texas Supreme Court's mandate to avoid sudden disruption in the education of Texas school children when it denied the injunction request. Freeman v. Dies, 307 F. Supp. 1028 (N.D.Tex. 1969); Kilgarlin v. Hill, 386 U.S. 120, 17 L. Ed. 2d 771, 87 S.Ct. 820 (1967).

Third, both Bilbo and Conley do not involve situations where the Texas Supreme Court told the Legislature to act. They do, however, involve situations where the Texas Supreme Court gave specific mandates which left no room for interpretation regarding implementation of the mandate. In Edgewood, on the other hand, this Court specifically did not provide specifics regarding its mandate. As this Court said, "Although we have ruled the school financing system to be unconstitutional, we do not now instruct the legislature as to the specifics of the legislation it should enact...." Edgewood, at 399.

Fourth, Appellants' reliance on Bilbo is also ill-placed because the Supreme Court's mandate must now be applied to different facts. The Texas Supreme Court acted as an impetus for change, it did not mandate any specific remedies. The first trial involved House Bill 72. The second trial involved Senate Bill 1.

Separate fact issues were raised by both. Because a new statute is being scrutinized, the Court of Appeals should be afforded its opportun .y to determine questions of fact which necessarily will be before it.

Finally, in the Supreme Court case of City of Tyler v. St. Louis Southwestern Railway Company, 405 S.W.2d 330 (Tex. 1966), the Supreme Court held that jurisdiction of this Court to compel enforcement of its judgments does not include the jurisdictional power to vacate or modify judgments because of changed conditions. In the case at bar, the trial court found changed conditions. Accordingly, this court does not yet have jurisdiction over this matter.

II. THE PROPER FORUM FOR THIS APPEAL IS THE COURT OF CIVIL APPEALS.

This Court has long held that the Supreme Court has appellate jurisdiction only in questions of law arising in cases in which the courts of civil appeals have appellate jurisdiction. The two exceptions are, for the Supreme Court, original jurisdiction and direct appeal from the trial courts. Subject to these exceptions, it is contemplated that the Supreme Court should not pass on a case until it has been determined in a court of civil appeals. Hunt, et al. v. Wichita County Water Improvement District No. 2, 211 S.W.2d 743 (Tex. 1948).

Since this Court does not have jurisdiction of Appellant's appeal as a direct appeal, the only avenue open to Appellants is this Court's appellate jurisdiction to hear "questions of law

arising in cases of which the Court of Civil Appeals have appellate jurisdiction." Tex. Const., art. V, section 3.

Article V, section 6 of the Texas Constitution vests in the Court of Civil Appeals jurisdiction to "all civil cases of which the district courts or county courts have original or appellate jurisdiction." Article V, section 6 of the Texas Constitution further provides that "the decisions of said courts (civil courts) shall be conclusive on all questions of fact brought before them on appeal or error."

It is apparent from Article V, sections 3 and 6 of the Texas Constitution that in this case the Supreme Court and Court of Civil Appeals may exercise only these two classes of jurisdiction. It was never the purpose of the Organic Law to permit one tribunal to interfere with the lawful exercise by another of the judicial power allocated to it. Morrow v. Corbin, 62 S.W.2d 641 (Tex. 1933).

Appellants rely upon Conley, Id. and Bilbo, Id. as authority for this Court having jurisdiction to carry out its judgment in Edgewood, Id. However, Judge McCown found that there had been a change of conditions since this Court's decision in Edgewood, Id. Those changed conditions merited his denying Appellants' request for a permanent injunction. This Court held in Tyler, Id., that once the Supreme Court hands down a decision and there is a change of conditions, this Court does not have original jurisdiction to review the trial court's decision.

Appellants' appeal from the denial of a permanent injunction of the trial court, must be reviewed by the Court of

Civil Appeals. As an appellate court in equity, the Court of Civil Appeals must review the evidence to ascertain whether or not the ruling of Judge McCown was correct as in any other appellate review. Electronic Data Systems Corp. v. Powell, 524 S.W.2d 393, (Tex. Civ. App.--Dallas 1975, writ ref'd n.r.e.).

Defendant-Intervenors have perfected their appeal of this case to the Court of Civil Appeals where it is now pending. Should this Court grant Appellants' direct appeal, it would terminate the appeal of Defendant-Intervenors in the Court of Civil Appeals. Railroad Commission v. Shell Oil Company, 206 S.W.2d 235 (Tex. 1947).

III. ACCEPTANCE OF JURISDICTION BY THE SUPREME COURT VIOLATES THE OPEN COURTS PROVISION OF THE TEXAS CONSTITUTION

Texas Constitution article I, section 13 states, in pertinent part: "...A[illegible]cs shall be open...." The open courts provision of the Texas Constitution is based largely on the Magna Carta. In free government, the doors of litigation are to be wide open and must remain wide open constantly. Interpretive Commentary to Tex. Const. art. I, section 13. The open courts provision of the Texas Constitution has very recently been acknowledged and protected. Actions of agencies of the State cannot violate the open courts provision. Fitts v. City of Beaumont, 688 S.W.2d 182 (Tex. App.--Beaumont 1985, writ ref'd n.r.e.); Borne v. City of Garland, 718 S.W.2d 22 (Tex. App.--Dallas 1986, writ ref'd n.r.e.).

Therefore, it follows that this agency of the State, the Texas Supreme Court, cannot violate the open courts provision of

the Texas Constitution. Should this Court grant the injunction requested by the Plaintiff-Intervenors, it would, in effect, deny Defendants/Appellees access to the Court of Appeals, in violation of the open court doctrine. Once the injunction is granted, the issue of whether the statute is constitutional is moot. Railroad, Id. A new statute or new finance plan must necessarily be implemented without full review of Senate Bill 1.

Once avenues of appellate review are established, they must be kept free of unreasoned distinctions that can only impede open and equal access to courts. Abdnor v. State, 712 S.W.2d 136 (Tex. Crim. App. 1986), on remand; 756 S.W.2d 815 (Tex. App.--Dallas 1988).

While an appeal is certainly not essential to due process of law, a dissatisfied litigant does have a constitutional right to have his case reviewed by a court of civil appeals. Beacon Lumber Co. v. Brown, 14 S.W.2d 1022 (Comm. App. 1929); Stroud v. Ward, 36 S.W.2d 590 (Tex. Civ. App.--Waco 1931).

Defendant-Intervenors have perfected their appeal to the Court of Appeals. By accepting jurisdiction of this case and determining the constitutionality of the statute, without prior factual determinations to be made at the Court of Appeals level, Defendant-Intervenors' right to have the fact issue litigated at the Court of Appeals level is totally abrogated. Railroad, Id. Such action by the Supreme Court of Texas would violate the open courts provision of the Texas Constitution.

Further, recent case law would support the theory that Appellants and Appellant-Intervenors who are school districts have no standing to challenge the constitutionality of a state statute.

> In other words, a State has no standing to assert that one of its very own legislative enactments denies it constitutional due process or deprives it of equal protection of the laws. The same rule applies to the State's agencies.

Parker County v. Weatherford Independent School District, 775 S.W.2d 881 (Tex. App.--Fort Worth 1989, no writ); citing Collier V. Poe, 732 S.W.2d 332, 344 (Tex. Crim. App. 1987); 108 S.Ct. 51 (1988); McGregor v. Clawson, 506 S.W.2d 922, 929 (Tex. Civ. App.--Waco 1974, no writ).

A school district is an agency of the State. Barr v. Bernhard, 562 S.W.2d 844 (Tex. 1978). Therefore, a school district cannot complain about the constitutionality of a statute, in this case, Senate Bill 1.

This argument cannot be twisted to obviate Defendant-Intervenors'/Appellees' claim to the constitutional protection of the open courts doctrine for two reasons. First, Defendant-Intervenors/Appellees are not complaining of the constitutionality of a statute. If the statute is followed, this direct appeal will be dismissed. Second, the due process and equal protection clauses of the Texas Constitution are provided to protect "persons", whereas the open courts clause merely says that the courts shall be open and does not limit that protection to "persons."

WHEREFORE, PREMISES CONSIDERED, Defendant-Intervenors/ Appellees respectfully request that this Court dismiss this direct

appeal for want of jurisdiction, and for such other and further relief, both special and general, to which Defendant-Intervenors/ Appellees may show themselves justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Defendant-Intervenors' Brief has been sent on the 15th day of November, 1990, by United States Mail, postage prepaid to all counsel of record.

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No. D-0378

DIRECT APPEAL

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IN THE
SUPREME COURT OF TEXAS

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EDGEWOOD INDEPENDENT SCHOOL DISTRICT, et al.,
Petitioners,

V.

WILLIAM N. KIRBY, et al.,
Respondents.

* * * * * * * *

BRIEF OF STATE-APPELLEES AND CROSS-APPELLANTS

* * * * * * * *

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IN THE
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* * * * * * * * *

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